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RECORD, CASE No. 13,734.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 150.

THE SWAN LAND AND CATTLE COMPANY, LIMITED, APPELLANT,

vs.

JOSEPH FRANK, MORRIS ROSENBAUM, JOSEPH ROSENBAUM, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 11, 1889.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Monday, the twenty-second day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

THE SWAN LAND AND CATTLE COMPANY, LIMITED,
vs.
JOSEPH FRANK, MORRIS ROSENBAUM, JOSEPH ROSENBAUM, Godfrey Snydacker, in His Own Right and as Administrator upon the Estate of Louis Snydacker, Deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, Charles A. Wilson, Alexander H. Swan, and Thomas Swan. } In Chancery.

2 NORTHERN DISTRICT OF ILLINOIS, *ss*:

Be it remembered that on the fourteenth day of July, 1887, came the complainant, by its solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its bond for costs and bill of complaint in said entitled cause; which said bond and bill are in the words and figures following, to wit:

Bond for Costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court, October Term, A. D. 1887.

THE SWAN LAND AND CATTLE COMPANY, LIMITED,
vs.
JOSEPH FRANK *et al.*

We enter ourselves as security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the said plaintiff of any costs ordered or adjudged to be paid by it we hereby agree and stipulate that execution may issue against our property for any costs taxed against said plaintiff.

Dated this 14th day of July, A. D. 1887.

SWIFT & CAMPBELL.

(Endorsed:) Filed July 14, A. D. 1887. Wm. H. Bradley, clerk.

3 *Bill of Complaint.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To the judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

The Swan Land and Cattle Company, Limited, a corporation organized and existing under and by virtue of the companies acts, 1862 to 1880, of the United Kingdom of Great Britain and Ireland, and a citizen of said kingdom, brings this its bill of complaint against Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinner, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Lowenberg, Patrick Long, Eugene Arnstein, Samuel Marks, all of whom are residents of the city of Chicago, in the State of Illinois, and citizens of said State of Illinois; also Charles E. Anthony, of Peoria, in said State of Illinois, and Charles A. Wilson, of Chatsworth, in said State of Illinois, both of whom are also citizens of said State of Illinois, and Alexander H. Swan,
4 Thomas Swan, of Cheyenne, in the Territory of Wyoming, both of whom are citizens of said Territory of Wyoming.

And thereupon your orator complains and says that on or about the twenty-seventh (27th) day of November, in the year of our Lord one thousand eight hundred and eighty-two, three certain corporations organized and existing under and by virtue of the laws of the Territory of Wyoming, and known respectively as the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, being the owners of large herds of cattle and other property in said Territory of Wyoming and engaged in the business of raising and selling what are known as range cattle, joined together in the making with one James Wilson, of Edinburgh, Scotland, acting on behalf of himself and others to be thereafter associated with him, a certain written agreement to bargain, sell, and convey, for the purchase price of two million five hundred fifty-three thousand eight hundred and twenty-five dollars ($2,553,825), to a limited liability company, to be thereafter incorporated under the companies acts of Great Britain and Ireland aforesaid, all and singular the lands and tenements, possessory rights to lands and tenements, water rights, improvements upon lands, houses, barns, stables, corrals, and other improvements and grazing priviliges; also all live stock, consisting of neat cattle, horses, and mules, belonging to said three Wyoming corporations or any or either of them; also all live stock, brands, tools, implements, wagons, harness, ranch, camp, and round-up outfits, and branding irons belonging to said Wyoming corporations or any or either of them, which said lands and tenements, possessory
5 rights, goods, and chattels were particularly enumerated and described in certain inventories annexed to said written

agreement and made a part thereof; which said agreement was made in triplicate and was duly executed by said three Wyoming corporations by their respective trustees and by said James Wilson on behalf of himself and said limited liability company to be formed as aforesaid, and said agreement, when executed, was duly delivered by the respective parties thereto on or about said twenty-seventh (27th) day of November.

And your orator further shows that the aforesaid agreement was in the following words and figures:

Agreement.

This agreement, made this 27th day of November, in the year 1882, between the Swan & Frank Live Stock Company, by Alexander H. Swan, Thomas Swan, Joseph Frank, Godfrey Snydacker, Joseph Rosenbaum, and Charles E. Anthony, its agents and trustees, and the National Cattle Company, by Amasa R. Converse, Alexander H. Swan, Thomas Swan, Godfrey Snydacker, Joseph Rosenbaum, Morris Rosenbaum and T. B. Hicks, its agents and trustees, and the Swan, Frank & Anthony Cattle Company, by Alexander H. Swan, Thomas Swan, Charles E. Anthony, Joseph Frank, and Zachariah Thomasson, its agents and trustees, all of said corporations having been duly created and now existing under and by virtue of the laws of the Territory of Wyoming, parties of the first part, and James Wilson, of 23 Mayfield
6 Gardens, Edinburgh, Scotland, on behalf of himself and others to be hereafter associated with him and designated party of the second part, witnesseth:

That for and in consideration of the sum of one dollar, lawful money of the United States of America, by the said party of the second part to each of the said companies, parties of the first part, in hand paid at or before the execution and delivery hereof, the receipt whereof is hereby acknowledged, and divers other good and valuable considerations, and the mutual covenants and promises hereinafter made and contained, the parties hereto have agreed and do hereby agree as follows, to wit:

First. The parties of the first part hereby promise and agree to and with the said party of the second part to grant, bargain, sell, and convey unto the limited liability company hereinafter mentioned, at the time and upon the conditions hereinafter set forth, all and singular the lands and tenements, possessory rights to lands and tenements, water rights, improvements upon lands, houses, barns, stables, corrals and other improvements and grazing privileges; also all live stock, consisting of neat cattle, horses, and mules, now belonging to said parties of the first part or any or either of them; also all live stock, brands, tools, implements, wagons, harness, ranche, camp, and round-up outfits, branding irons, now belonging to said parties of the first part or any or either of them and now used by said parties or either of them in carrying on the business of said companies or either of them on their ranches or ranges in Wyoming Territory, or wheresoever the same or any part thereof

may be, which said lands and tenements, possessory rights,
7 goods, and chattels are particularly enumerated and described in certain inventories hereto annexed, marked respectively A, B, C, D, E, F, G, H, I, and J, and which are hereby referred to and made a part hereof.

Second. And the party of the second part, in consideration of the premises aforesaid and of the promises and agreements upon the part of the parties of the first part herein contained, and also of the sum of one dollar, to him in hand paid by the parties of the first part at or before the execution and delivery hereof, the receipt whereof is hereby acknowledged, hereby promises and agrees on his part to and with the said first parties to proceed to Great Britain with all convenient speed, and there form a limited liability company, to be incorporated under the companies acts of 1862 to 1880, for the purpose of acquiring the property of the first parties hereinbefore referred to, which said limited liability company shall be so organized and formed not later than the 14th day of February, 1883.

Third. The first parties promise and agree further upon their part that immediately upon being notified by the said second party of the formation of the said limited liability company to make and execute, in due form of law, all such deeds or deeds, bill of sale or sales, and other instruments of writing as may be necessary and sufficient to convey to the said limited liability company all and singular the property of every kind and nature hereinbefore referred to and described; and that as to all of the lands in said inventories referred to, to which said parties of the first part or either of them now have title in fee, they will convey the same by deed or deeds sufficient to convey the title thereof, and as to all of said lands and tenements to which said
8 parties or either of them have only possessory rights or interests therein they will to all of such lands execute quitclaim deeds to said limited liability company; and that immediately upon the execution of all such conveyances and instruments as aforesaid they will deliver the same into the possession and custody of Isaac Bergman, Esq., county treasurer and probate judge of Laramie county, Wyoming, to be held by him in escrow and for delivery to said limited liability company upon performance by said second party of the conditions, promises, and agreements following, to wit:

Fourth. The said second party hereby promises and agrees to and with said first parties that he shall and will pay or cause to be paid the sum of two millions five hundred and fifty-three thousand eight hundred and twenty-five dollars to Amasa R. Converse, Esq., Charles E. Anthony, and Godfrey Snydacker, as trustees for the said parties of the first part, or to their survivors in case of the death of one or either of them; the same to be paid in three equal instalments into the Chemical National bank and to the Importers' and Traders' National bank in New York, subject to the joint order of the trustees aforesaid, as follows, to wit, the first instalment in ten days, the second in forty days, and the third in seventy days

after the formation of said limited liability company, it being expressly agreed and understood that the said payments or any of them shall not be made until after the delivery to said Isaac Bergman as escrow of all the papers herein provided to be delivered to the said Bergman by said first parties.

Fifth. And it is mutually agreed and understood by and between all the parties hereto that upon payment by said second party of all the sums hereinbefore agreed upon, then and in that case the said Bergman shall deliver to said limited liability company or its order all papers in his possession as such escrow as aforesaid; and, further, that upon the delivery of such papers as aforesaid said parties of the first part shall and will deliver possession of all the lands and tenement-, possessory rights, goods, and chattels hereinbefore and in the said inventories described: Provided, however, that said limited liability company shall and will accept and take possession of all the neat cattle intended hereby to be conveyed, wherever they may be ranging, without any other or further act on the part of said first parties save the delivery of said papers by the said Bergman.

Sixth. It is further agreed and understood by the parties hereto that in case said transfers and conveyances are made as herein agreed upon the said second party will pay or cause to be paid all the wages and ordinary running expenses of the parties of the first part in the management of the property which is the subject of this contract from and after the 31st day of December, 1882, and that said first parties will pay all such wages and running expenses prior thereto and will finish and complete, at their own cost and expense, before executing the conveyances hereinbefore agreed to be executed by them, all buildings and corrals now in process or course of construction by said first parties or either of them.

Seventh. And the said parties of the first part further agree to and with said second party that the representations in the annexed inventories in regard to all propepty therein described and mentioned, except the live stock, shall be verified by a competent inspector or inspectors, to be named by the said party of the second part as early as practicable and before the execution of the conveyances hereinbefore mentioned, and that deficiencies, if any, in such representations shall be made good or supplied by the said parties of the first part; and it is further agreed on the part of the said first parties, as to all live stock mentioned and described in said inventories, that said first parties shall and do hereby agree and guarantee to and with said second party that the herd books of said first parties, showing the acquisitions, increase, disposition of, and number of cattle now on hand of said first parties respectively, have been truly and correctly kept, and that a copy of all such entries, duly certified by the secretaries of said first parties respectively, shall be furnished to said party of the second part with this agreement; and, further, that the said inspector shall also have the right to inspect and examine the books of said companies respectively relating to their said business freely and at all reasonable times.

And, finally, it is mutually agreed and understood by and between the parties hereto that in the event the said second party shall be unable to form the proposed limited liability company on or before the 14th day of February, 1883, then and in that case this agreement is to be null and void, the same as if it had never been made, and all the parties hereto shall be released from all the obligations hereunder.

In witness whereof all of the said parties have hereunto set their hands in triplicate the day and year first above written.

In the presence of—

——— ———.

Thirty-four words delete on fourth page before signing and eighty words on second page.

(S'g'd) ALEXANDER H. SWAN.
THOMAS SWAN,
By his att'y-in-fact, ALEXANDER H. SWAN.
CHARLES E. ANTHONY,
By his attorney-in-fact, ALEXANDER H. SWAN.
11 AMASA R. CONVERSE.
F. B. HICKS,
By AMASA R. CONVERSE,
His Att'y-in-Fact.
GODFREY SNYDACKER.
JOSEPH FRANK.
MORRIS ROSENBAUM.
ZACHARIAH THOMASSON.
JOSEPH ROSENBAUM.
JAS. WILSON.

Witnesses to all the signatures:
ELBRIDGE HANEY.
NATHANIEL L. YOUNG.

Your orator further showeth that after the making and delivery of the aforesaid agreement, and on or about the fifth (5th) day of December, 1882, the directors of said three corporations (who under the laws of the Territory of Wyoming are called and known as trustees and are hereinafter so designated) held meetings of their respective boards and passed resolutions ratifying and approving the aforesaid agreement and providing that each of the shareholders of said three corporations should receive fifteen (15) per cent. of his share of the proceeds of the sale to be made under the aforesaid agreement in shares of the limited liability company to be formed as provided in said agreement.

Your orator further showeth that subsequently, and on or about the thirteenth (13th) day of January, 1883, the trustees of said three Wyoming corporations (which corporations your orator hereinafter designates the "vendors") held other meetings, at which they passed resolutions authorizing said Alexander H. Swan, who was the president of each and all of said vendors, to execute, as attorney-in-fact of said vendors respectively, all conveyances and contracts which

might be necessary or proper to carry into effect the obligations and stipulations of the aforesaid agreement, and further authorizing and fully empowering him, according to his best judgment and discretion, to consent to and make such alterations in or modi-
12 fications of said agreement as he might think expedient and for the best interests of said vendors (except as to the purchase price fixed by said agreement and as to the disposition of the proceeds of sale), and also authorizing and empowering him to make, as attorney-in-fact of said vendors, all such deeds, contracts, agreements, or other papers as should be necessary to carry into effect the said agreement in its form as altered or modified.

Your orator further showeth that shortly prior to the execution and delivery of the aforesaid agreement, and some time in the same month of November, one Thomas Lawson, a farmer, of Sandyford, Scotland, had visited and inspected the properties described in the foregoing agreement of sale, and subsequently made a written report thereon, bearing date December 1, 1882, a copy of which report is hereto attached, marked Exhibit "A," and made a part of your orator's bill of complaint.

And your orator further showeth that said Lawson had previously and some time in the month of June of the same year, 1882, visited said properties at the instance and request of said Alexander H. Swan; that he was accompanied in his visit made in November by said James Wilson, and that for his services in making said inspection and report he was paid by said vendors, as your orator is informed and believes, the large sum of twelve thousand dollars ($12,000); and your orator avers that said Lawson in making said inspection and report was acting in the interest and in the employ of said vendors.

Your orator further showeth that after the execution and delivery of the aforesaid agreement, and some time in the month of December, 1882, said James Wilson returned to Scotland, visited Edinburgh, and laid before certain parties the aforesaid agreement of sale and the aforesaid report of said Lawson for the purpose
13 of inducing said parties to associate with him as promoters of a corporation to purchase the properties covered by said agreement of sale in accordance with the terms thereof.

And your orator further showeth that said Alexander H. Swan also, about the same time or shortly thereafter, went to Edinburgh for the purpose of assisting said Wilson in inducing said parties to associate together to organize and float a company and to assist in the formation and floating of such corporation; that he took with him documents purporting to be copies of the herd books of said three vendors, and laid the same before the parties whom said Wilson was seeking to associate with him as aforesaid, and made and also laid before said parties an estimate of the probable increase and profits of the proposed corporation, which estimate was made upon the basis that said vendors would sell to said corporation eighty-nine thousand one hundred sixty-seven (89,167) head of cattle, as specified in and by said agreement of sale, and your orator attaches hereto copies of all said documents furnished by said Swan, the

documents purporting to be copies of said herd books, being marked Exhibits "B," "C," and "D" respectively, and the copy of said estimate, Exhibit "E," and your orator makes all of said exhibits parts of its bill of complaint.

Your orator further showeth that said Swan also carried to Edinburgh the business books of two of said vendors, namely, the Swan and Frank Live Stock Company and the National Cattle Company, but did not carry the business books of the other vendor, the Swan, Frank and Anthony Cattle Company, because said last-named vendor had only been, as he said, a short time in existence,
14 and all of said books, with the copies of the herd books of said vendors, were laid before a firm of chartered accountants in Edinburgh by the parties whom said Wilson and said Swan sought to associate together to organize and float a company as aforesaid, and said accountants called the attention of said parties to the fact that said books did not show any deduction from the numbers of the cattle of said vendors on account of losses by death, and thereupon said Swan represented to said accountants and to said parties and induced them to believe that any such losses were amply compensated for by the number of calves on the ranches not included with those branded at the usual branding season.

Your orator further showeth that said Alexander H. Swan had spent about ten years of his life previous to that time in that part of Wyoming where the herds of said vendors were ranging, had himself collected together said herds and managed the same, had associated other parties with him, and had caused said three Wyoming corporations to be organized, and was the president of each of said corporations and the manager of all of the same, and was, as your orator was informed and believes, a large shareholder in each of said companies; and the parties whom said Swan induced to organize and float the Swan Land and Cattle Company, Limited, believed and still believe that said Swan was entirely familiar with the condition of the properties he was selling, and, because of his relations to said properties as aforesaid and his knowledge of the same, said parties implicitly relied upon the representations made by him that any death losses suffered by the herds of said vendors were amply made good by the calves on the ranches which escaped branding at the usual branding season, and said Swan as-
15 sured said parties that there was no doubt that said vendors had upon their ranges the full number of eighty-nine thousand one hundred sixty-seven (89,167) cattle which they had agreed to sell as aforesaid.

Your orator further showeth that numerous meetings were held by the aforesaid parties at said Edinburgh, extending from the 14th of February, 1883, till the company was formed by the registration of its memorandum and articles of association on the 30th of March, 1883, at all of which meetings said Alexander H. Swan was present, and during that time two further agreements were made, one between the aforesaid vendors, as parties of the first part, Alexander H. Swan himself, as party of the second part, and said James Wilson, on behalf of said company, to be formed as party of the

third part, which agreement was reduced to writing, was called by the parties a supplementary agreement, bears date the 13th day of February, 1883, and provides, amongst other things, for an extension of time for carrying out the aforesaid agreement of sale; provides that the purchase price, instead of being paid in three equal installments, shall be paid in four equal installments; provides that the vendors shall subscribe for seven thousand nine hundred (7,900) ten-pound shares of the capital stock of the limited liability company to be formed; provides further that said Alexander H. Swan himself shall subscribe for such number of shares as shall, taken with the shares subscribed by said vendors, make up the full number of ten thousand (10,000) shares; provides that said Alexander H. Swan shall become the general manager of said company to be formed; provides that said vendors shall pay a certain part of the expenses connected with the organization of the com-
16 pany to be formed, and provides further that the articles of association of said limited liability company to be formed shall expressly recognize and confirm the aforesaid agreement of sale as modified by said supplementary agreement, and shall bind the company to be formed to carry out said agreement as thus modified, with such modifications, if any, as may be agreed upon between the parties thereto, and that upon the adoption of said agreement by such company said Wilson shall be discharged from all liability in respect thereof, and your orator attaches hereto a full copy of said supplementary agreement, marked Exhibit "F," and makes the same a part of its bill of complaint.

Your orator further showeth that the other of said agreements was made between the same parties as said Exhibit "F," and was also reduced to writing, was called by the parties thereto an additional agreement, bears date the 9th day of March, 1883, and provides that said vendors agree with said James Wilson, on behalf of the company to be formed, that said company shall be formed on the basis of a certain prospectus and memorandum and articles of association, and provides that said Alexander H. Swan shall receive a salary of ten thousand dollars ($10,000) per annum for his services as general manager of the company's cattle business in America, and said vendors do in and by said additional agreement agree that if the calves branded in the year 1883 as the calves of the herds sold by said three vendors to said company to be formed shall be fewer in number than seventeen thousand eight hundred sixty-eight (17,868) head said three vendors shall jointly and severally be bound to pay to said company thirty-one dollars and sixty-eight cents ($31.68) for each head of the calves deficient, and your orator attaches hereto a full copy of said additional agreement,
17 marked Exhibit "G," and makes the same a part of its bill of complaint.

Your orator further showeth that prior to the execution of said additional agreement the aforesaid prospectus, memorandum of association, and articles of association had been prepared, and said Swan had himself assisted in the preparation of the same, and printed copies of each and all of the same were signed by *and* the

said Swan as the attorney-in-fact of said vendors as in his own right and by said Wilson on behalf of the company to be formed, and all the same were signed at the same time with and were made a part of said additional agreement, and the same constituted, as hereinbefore stated, the basis upon which the proposed company was to be formed and floated.

Your orator further showeth that the parties whom said Swan and said Wilson were trying to induce to associate themselves with said Wilson as promoters of a limited liability company, to be organized and floated for the purpose of carrying out by purchase the aforesaid agreement of sale, relying upon the representations made by said Swan that said vendors had upon their ranges and would turn over under said agreement of sale to such company as should be formed the full number of eighty-nine thousand one hundred sixty-seven (89,167) head of cattle, and relying also upon the report of said Lawson, which unknown to them had been procured and paid for by said vendors as aforesaid, and relying also upon the inventories attached to and made a part of said agreement of sale, and relying also upon the guaranty in which said three vendors had joined in said agreement of sale that their herd books had been truly and correctly kept and showed the acquisition, increase, disposition of, and number of cattle then on hand of said vendors re-
18 spectively, and relying upon the guaranty of the number of calves to be branded in 1883 contained in the additional agreement of March 9, 1883, as aforesaid, determined to accede to the request of said Swan and to act as promoters of a company to be formed under the companies acts of Great Britain and Ireland, 1862 to 1880, and to issue a prospectus soliciting subscriptions to the capital stock of said company, and said promoters thereupon and on or about the 13th day of March, 1883, did issue a prospectus calling for subscriptions for shares in a limited liability company to be formed under the aforesaid acts, with a nominal capital of six hundred thousand (600,000) pounds, divided into sixty thousand (60,000) shares of ten (10) pounds each, and to be known as the Swan Land and Cattle Company, Limited.

Your orator further showeth that the prospectus issued by said promoters was the same prospectus which had been approved by said Swan as the attorney-in-fact of said vendors and been made a part of said additional agreement dated March 9, 1883, and said prospectus recited that detailed inventories were attached to the agreement of sale and made a part thereof; that the vendors had exhibited copies of the herd books of said vendors which corresponded with said inventories, and that the vendors guaranteed that said herd books, showing the acquisitions, increase, disposition of, and number of cattle on hand, had been truly and correctly kept, and that copies of said agreement, inventories, and herd books might be seen by parties desiring to subscribe for shares at the offices of certain brokers and solicitors named in said prospectus, and your orator attaches hereto a copy of said prospectus, marked Exhibit "H," and makes the same a part of its bill of complaint.

19 Your orator further showeth that shortly after the issuing of said prospectus and prior to the thirtieth (30th) day of March, 1883, subscriptions were made for a sufficient number of the shares of said company to justify the promoters thereof in organizing the same, and upon the thirtieth (30th) day of said month said promoters registered the aforesaid memorandum of association and articles of association in accordance with the requirements of the companies acts aforesaid, and thereupon your orator, the Swan Land and Cattle Company, Limited, became and ever since has been a legally organized corporation; and your orator showeth that the memorandum of association and articles of association which were registered by the promoters of said company as aforesaid were the same memorandum and articles which had been accepted and approved by said Swan as the attorney-in-fact of said vendors and the same which were made and are a part of said additional agreement of March 9, 1883, and your orator attaches hereto a copy of said memorandum of association and articles of association, marked Exhibit "I," and makes the same a part of its bill of complaint.

Your orator further showeth that a copy of said memorandum of association was endorsed upon and made a part of said prospectus and recited that one of the objects for which the company was to be organized was:

"(1.) To take over the purchase of and acquire the herds, ranches, and others described in an agreement between the Swan and Frank Live Stock Company, by Alexander H. Swan, Thomas Swan, Joseph Frank, Godfrey Syndacker, Joseph Rosenbaum, and Charles E. Anthony, its agents and trustees; the National Cattle Company,
20 by Amasa R. Converse, Alexander H. Swan, Thomas Swan, Godfrey Syndacker, Joseph Rosenbaum, Morris Rosenbaum, and T. B. Hicks, its agents and trustees, and the Swan, Frank and Anthony Cattle Company, by Alexander H. Swan, Thomas Swan, Charles E. Anthony, Joseph Frank, and Zachariah Thomason, its agents and trustees, all of said corporations having been duly created and now existing under and by virtue of the laws of the Territory of Wyoming, United States of America, of the first part, and James Wilson, of 23 Mayfield gardens, Edinburgh, Scotland, on behalf of himself and others to be associated with him, of the second part, dated 27th November, 1882, as modified by a supplementary agreement between the said Alexander H. Swan, attorney for and on behalf of said three companies, of the first part, the said Alexander H. Swan, for his individual interest, of the second part, and the said James Wilson, of the third part, dated 13th February, 1883, and an additional agreement between the said Alexander H. Swan, attorney aforesaid, him for his individual interest, and the said James Wilson, dated 9th March, 1883, and to adopt and carry out said agreements, either in their present form or with such modifications as may be agreed on by the vendors or their attorney and the company."

And the sixth (6th) article of said articles of association is as follows:

"The company shall adopt and give effect to the agreement be-

tween the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, of the first part, and James Wilson, of 23 Mayfield gardens, Edinburgh, Scotland, of the second part, dated 27th November, 1882, men-
21 tioned in the memorandum of association, as modified by the supplementary agreement of 13th February, 1883, and the additional agreement of 9th March, 1883, both also mentioned in said memorandum of association, and shall implement the obligations in said agreements incumbent on the said James Wilson, and shall have all the rights conferred on him thereby, and the seal of the company shall be affixed to said three agreements, so as to constitute them contracts of the company."

All which will appear from the copy of said prospectus and the copy of said articles of association, hereto attached as Exhibits "H" and "I" respectively.

Your orator further showeth that after the organization of said company and on or about the twenty-second (22) day of May, 1883, the directors of said company, at a meeting duly called and held, did, in accordance with said sixth (6th) article of the articles of association of said company, pass a vote that said company should adopt and give effect to the aforesaid agreement of sale between said vendors and said Wilson as modified by said supplementary agreement and said additional agreement, and that said company should fulfill all the obligations of said agreements incumbent upon said James Wilson as the representative of said company, and that said company should have all the rights conferred upon said Wilson by said agreements, and said directors instructed two of their number, namely, Colin J. McKenzie and James Shepherd, and their secretary, Finlay Dun, to endorse said agreements as adopted by said company and to attach thereto the corporate seal of said company, so as to constitute the same contracts of said company.

Your orator further showeth that subsequently, in accordance with the aforesaid vote of the directors of said company, said
22 Colin J. McKenzie and James Shepherd, the two directors aforesaid, and said Finlay Dun, the secretary of said company, did cause to be endorsed upon said agreement of sale the following:

"This is the agreement referred to in minute of adoption by the Swan Land and Cattle Company, Limited, having its registered office at No. 130 George street, Edinburgh, Scotland, of even date herewith.

"In witness whereof these presents, written by William John Paterson, clerk to Messrs. Fraser, Stodart & Ballingall, writers to the signet, Edinburgh, are executed by us, the said company, as follows, viz: They are subscribed for and on behalf of our said company by Colin J. McKenzie, of Portmore, and James Shepherd, manufacturer, Kirkcaldy, two of our directors, and by Finlay Dun, our secretary, and are sealed with our common or corporate seal, all as authorized by minute of meeting of the board of directors of said company held on the 23d day of May, 1883, on the 24th day

of the same month and year, before these witnesses, the said William John Paterson and Thomas Murray, clerk to the said The Swan Land and Cattle Company, Limited.

"(Signed) COLIN J. McKENZIE, *Director.*
"JAS. SHEPHERD, *Director.*
"FINLAY DUN, *Secretary.*

"W. J. PATERSON, *Witness.*
"THOMAS MURRAY, *Witness.*"

[CORPORATE SEAL.]

23 Your orator further showeth that a similar writing was endorsed upon said supplementary agreement of February 13, 1883, and was signed by the same parties before the same witnesses and the corporate seal of said company thereto duly attached; and upon said additional agreement of March 9, 1883, said company caused the following writing to be endorsed: "The Swan Land and Cattle Company, Limited, having its registered office at No. 130 George street, Edinburgh, Scotland, hereby adopts the agreement dated 27th November, 1882, specified in the before-written additional agreement, as said first-mentioned agreement is modified by the supplementary agreement dated 13th February, 1883, also before specified, and by said additional agreement to the effect of said agreement, modified as aforesaid, becoming a contract of the company, and the company thereby acquiring all the rights conferred by said three deeds on James Wilson, therein designed and becoming liable to fulfill all the obligations thereby imposed upon him so far as not already implemented.

"In witness whereof these presents, written by William John Paterson, clerk to Fraser, Stodart & Ballingall, writers to the signet, Edinburgh, are executed at Edinburgh by us, the said company, as follows, viz: They are subscribed for and on behalf of our said company by Colin J. McKenzie, of Portmore, and James Shepherd, manufacturer, Kirkcaldy, two of our directors, and by Finlay Dun, our secretary, and are sealed with our common or corporate seal, all as authorized by minute of meeting of the board of the directors of said company held on the 22d day of May, 1883, on the 24th day of the same month and year, before these witnesses,

24 the said William John Paterson and Thomas Murray, clerk of the said The Swan Land and Cattle Company, Limited.

"(Signed) COLIN J. McKINZIE, *Director.*
"JAS. SHEPHERD, *Director.*
"FINLAY DUN, *Secretary.*

"W. J. PATERSON, *Witness.*
"THOMAS MURRAY, *Witness.*"

[CORPORATE SEAL.]

Your orator further showeth that in and by said agreement of sale said James Wilson agreed to form a limited liability company, duly incorporated under the companies acts aforesaid, for the pur-

pose of acquiring from said vendors the property described in said agreement and in the schedules thereto attached, and said vendors agreed, in and by said agreement of sale, to sell and convey the aforesaid property to such company as soon as the same should be formed; and your orator saith that said vendors accepted your orator as the company which said Wilson had agreed to form and as the company with which the agreements of said vendors should be carried out, and your orator accepted said agreements as made for it and on its behalf, and thereupon said vendors and your orator became obligated to each other to perform the mutual agreements contained in said agreement of sale of November 27, 1882, said supplementary agreement of February 13, 1883, and said additional agreement of March 9, 1883, as fully and completely as if your orator had been party to each and all of the same by name in lieu of said Wilson.

Your orator further showeth that said Alexander H. Swan subscribed for ten thousand five hundred (10,500) shares of the capital stock of your orator and, upon his request, the same was
25 allotted and issued to the three persons named in said agreement of sale as the parties to receive the purchase price of said properties in trust for said vendors, namely, Amasa R. Converse, Charles E. Anthony, and Godfrey Snydacker, and said trustees received said share and subsequently divided the same amongst and transferred the same to the various shareholders of said vendors as a part of the purchase price of said properties.

Your orator further showeth that shortly after the organization of your orator and some time in the month of April, 1883, said vendors delivered to Isaac Bergman, county treasurer and probate judge of Laramie county, Wyoming, certain deeds and bills of sale running to your orator, to be held by him in escrow for delivery to your orator upon performance by your orator of the agreements made with said vendors by said Wilson on behalf of a company to be formed as aforesaid, and thereupon your orator paid the full purchase price of two million five hundred fifty-three thousand eight hundred twenty-five dollars ($2,553,825), as fixed by said agreement of sale, less certain deductions for expenses which were agreed upon between said vendors and your orator, and after said purchase price had been fully paid by your orator said deeds and bills of sale were delivered by said Bergman to your orator, and your orator thereupon took possession of the properties transferred to it by said vendors.

Your orator further showeth that said vendors represented to your orator, as well as to said promoters and to the shareholders of your orator, that it was impossible to count the cattle which said vendors agreed to sell to your orator, and that your orator would be obliged to take possession of the same wherever they might
26 be ranging without any count whatever and without any other or further act on the part of said vendors than the delivery of said papers by them to said Bergman and by him to your orator, but that as to all other property sold except said cattle your orator might have the same inspected and said vendors would make

good any deficiencies found by such inspection; and your orator relying upon the representations made by said vendors in the inventories attached to and made a part of said agreement of sale and upon the representation of said vendors that the death losses in their herds were made good by the number of calves which escaped branding at the regular branding season, and their further representations that they undoubtedly had the full number of eighty-nine thousand one hundred sixty-seven (89,167) head of cattle, and relying upon the joint guaranty of said vendors that their herd books truly and correctly showed the number of cattle then on hand, and upon the guaranty that the calf brand of the year 1883 would amount at least to seventeen thousand eight hundred sixty-eight (17,868) calves, and fully believing, as stated by said vendors, that it was impossible to count said cattle, your orator consented to receive delivery of said cattle and did receive the same without any count, and took the same wherever they were ranging without any other act on the part of the said vendors than the delivery of said papers by said vendors to said Bergman and by said Bergman to your orator.

Your orator further showeth that it had implicit reliance upon the representations of said vendors and such complete confidence in said Alexander H. Swan, the president of said vendors, that your orator made an agreement with said Swan to continue him
27 in charge of said herds as manager for your orator and agreed to pay him for his services in that position a salary of ten thousand dollars ($10,000) per year, and said Swan did at once after said purchase was consummated by your orator take charge of said herds and all of said ranch property as manager for your orator and has continued to be such manager until a very recent date.

Your orator further showeth that the organization, the subscription for the shares of your orator (except the shares allotted to the vendors as aforesaid and forty-eight hundred (4,800) shares subscribed for by said Swan himself and issued to him), and the purchase by your orator from said vendors were all induced by the representations made to said promoters, to said subscribers, and to your orator, which representations are found in the report of said Lawson, said agreement of sale, said copies of herd books, said estimate made by said Swan, and said prospectus and the oral representations made by said Swan as to the number of cattle then possessed by said vendors. And your orator avers that it was intended by said vendors that their aforesaid representations should produce such results, and your orator consummated said purchase in full reliance thereon.

Your orator further showeth that said vendors guaranteed by the terms of said additional agreement that at least seventeen thousand eight hundred sixty-eight (17,868) calves would be branded in the year 1883 as increase of the herds purchased by your orator from said vendors; and said Swan as manager for your orator reported that seventeen thousand nine hundred thirty-two (17,932) calves were actually branded as such increase. But your orator showeth

that in the year 1882 from the same herds only thirteen
28 thousand eight hundred ninety-three (13,893) calves were branded, and in the year 1883 the number of calves branded from a certain other herd ranging over the same territory and in all respects similar to the herd of your orator yielded a number of calves equal to about thirty (30) per cent. of the number of cows in such herd, while if the herds of your orator yielded in that year seventeen thousand nine hundred thirty-two (17,932) calves, as reported, the number of calves was at least forty-six (46) per cent. of the number of cows in said herd, and your orator avers that the calf brand of that year was incorrectly reported in order to convince your orator that it had acquired from said vendors the number of cattle which said vendors had undertaken to sell.

Your orator further showeth that said Swan in his aforesaid estimate estimated that the yield of the herds purchased by your orator from said vendor would, in the year 1886, be twenty-two thousand eight hundred twenty-six (22,826) calves. But said Swan as manager of your orator reported at the close of said year that only sixteen hundred (1,600) calves had been branded, notwithstanding a considerable number of cows had been added to said herd by purchase. And your orator saith that since said year 1883 the number of calves yielded by said herds has been very greatly less than it would have been if said herds had contained the number of cows which the vendors represented to be contained in said herds at the time of said purchase.

Your orator further showeth that the inventories attached to and forming a part of said agreement of sale showed that said vendors had ten thousand five hundred fifty-seven (10,557) steers, three years old and upwards, and in that year your orator pur-
29 chased from other parties twenty-two hundred ninety-one (2,291) steers, three years old and upwards, and yet your orator was able to gather and send to market in that year only sixty-seven hundred sixteen (6,716) steers. In 1884 your orator should have had, if the representations of said vendors had been true, at least nineteen thousand (19,000) steers, three years old and upwards, of which your orator should have been able to gather and send to market at least ten thousand (10,000) head, but your orator was only able to send to market fifty-nine hundred fifty-five (5,955) head.

Your orator further showeth that the number of steers in said herd suitable for shipment for beef should, if the representations of said vendors were true, have continually increased, but in the year 1885, notwithstanding the purchases which had been made by your orator from other parties, your orator was able to send to market only sixty-three hundred thirty-one (6,331) steers, and in the year 1886 only about thirty-five hundred (3,500) steers.

Your orator further showeth that it has now learned that the representations made by said vendors that they had eighty-nine thousand one hundred sixty-seven (89,167) head of cattle to sell to your orator was grossly untrue, and the representations made by said vendors that the number of calves in their herds which escaped

branding at the regular branding season was sufficient to offset death losses in said herds was also grossly untrue. And your orator avers that the fact that said representations were untrue was known to said vendors, and said vendors had been urged to make a deduction from the number of their cattle as shown by their herd books to offset the losses in said herds before the same were sold to
30 your orator and they had refused so to do. And your orator further avers that it was not impossible, as represented by said vendors, to count said cattle; but said vendors were unwilling to have said cattle counted, because they well knew that such count would show that they did not have the number which they purported to have and had agreed to sell.

Your orator further showeth that since it purchased said herds from said vendors the same have been well managed and cared for, and your orator has spared no reasonable expense to cause the same to yield the best possible results by increase in numbers of calves and increase in numbers and quality of beef cattle, and your orator has annually made large deductions from the numbers of cattle in said herds, as shown by the books of your orator, to offset the losses in said herds by death. Yet, notwithstanding said management and notwithstanding the large deductions made as aforesaid, the yield of said herds in calves and in beef cattle has been much less in numbers and smaller in percentage than it ought to have been, and far below the estimates made by said Swan as aforesaid, and far below what the yield would have been had your orator acquired by its purchase from said vendors the number of cattle which said vendors undertook to sell. And your orator saith that there were at least thirty thousand (30,000) head of cattle less in the herds sold to your orator than said vendors represented themselves to have, and your orator has suffered a damage in consequence of such deficiency and in consequence of the misrepresentations of said vendors to the amount of at least eight hundred thousand dollars ($800,000).

Your orator further showeth that said vendors had no
31 other business except the management of the herds sold to your orator and no other assets, or substantially none, except the properties sold by them to your orator; and your orator showeth that after the sale of their said properties to your orator and the receipt by them of the purchase price, as aforesaid, said three vendors paid whatever liabilities they had outstanding, except their liability to your orator herein set forth, and distributed the money and stock obtained from your orator as the proceeds of said sale and all their other assets amongst their respective shareholders, and the same were received by said shareholders, and since that time said three corporations have not nor has either of them made any use whatever of their franchises, but they have abandoned the same, and neither of said corporations has any officer or agent upon whom process can be served, and they have not nor has either of them any assets of any kind out of which any judgment at common law against them or either of them could be satisfied.

Your orator further showeth that the assets of said corporations

were in the hands of said corporations a trust fund, held by said corporations in trust to satisfy the claim of your orator herein set forth before the shareholders of said corporations were entitled to receive any portion of the same, and said shareholders in receiving said assets did take and now hold the same as trustees in place of said corporations and subject to the lien of your orator's aforesaid claim; and your orator showeth that all of the defendants herein and one Louis Snydacker were shareholders in some one or more of said corporations and received their proper shares of the assets of said corporations when said assets were distributed by said corporations as aforesaid, and said defendants hold the assets re-
32 ceived by them as aforesaid as trustees and should account for the same to your orator and apply the same, so far as necessary, in satisfaction of your orator's claim herein set forth; and your orator showeth that said Louis Snydacker has died intestate since the said vendors distributed their assets as aforesaid; that said Louis Snydacker received as shareholder in one or more of said vendors a portion of said assets, and said Godfrey Snydacker, who has been duly appointed and still is administrator upon the estate of said Louis, should account to your orator for that part of said assets received by said Louis.

Your orator further showeth that your orator has made defendants to this bill of complaint all the persons who reside in or are now within the jurisdiction of this honorable court and known to your orator to have been shareholders in said three corporations, the vendors, or any or either of them at the time of the occurrence of the matters herein complained of, but in case any other of said shareholders not made defendants herein shall hereafter come within said jurisdiction your orator desires to make such shareholders additional parties defendant hereto.

To the end, therefore, that said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, to the best of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid (but not under oath, the necessity of the answer of such defendants being put in under the oaths of the said defendants or the oath of either of them being hereby waived), and that each of said defendants may, in manner aforesaid, answer such of the several interrogatories hereinafter numbered and
33 set forth as by the note hereunder written they are respectively required to answer, and that whatever said defendants or either of them shall have received from said The Swan and Frank Live Stock Company, said The National Cattle Company, and said The Swan, Frank and Anthony Cattle Company or any or either of said corporations as or on account of their or his share of the proceeds of said sale to your orator shall be decreed by this honorable court to have been taken and to be held by said defendants or defendant in trust for the payment of the claims of your orator hereinbefore set forth, and that the same may be applied, so far as shall be necessary, in satisfaction of the damages which shall be found due to your orator from the vendors aforesaid upon final

hearing hereof; and that your orator may have such further or other relief as the nature of this case may require and to your honors seem meet.

May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Lowenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, Charles A. Wilson, Alexander H. Swan, and Thomas Swan, commanding them and each of them to appear before this honorable court and answer this bill of complaint as hereinbefore prayed, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet; and your orator will ever pray.

34 NOTE.—Each of the defendants is required to answer the interrogatories numbered 1, 2, 3, 4, and 5, and the defendant Joseph Frank is required also to answer the interrogatories numbered 6, 7, 8, 9, 10, 11, 12, and 13, and the defendant Charles E. Anthony is required also to answer the interrogatories numbered 14, 15, 16, 17, 18, 19, and 20, and the defendant Godfrey Snydacker is required also to answer the interrogatories numbered 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, and the defendants Charles E. Anthony and Godfrey Snydacker are required also to answer the interrogatories numbered 31 and 32.

1. Did you own or hold any shares of stock in the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company or either of them upon November 27, 1882; and, if so, how many shares did you own or hold in each of said companies?

2. Have you received from the companies named in the first interrogatory or from any or either of them any part of the assets of said companies or any or either of them since November 27, 1882; and, if so, what have you received, or have you since said date received any shares of stock in the Swan Land and Cattle Company, Limited; and, if so, how many shares?

3. Do you know any person or persons other than yourself who, on or after November 27, 1882, owned or held any share or shares of stock in the three companies named in the first interrogatory or in any or either of them? And, if so, give the names of all such persons and state, as far as you know or are informed, the number of shares of such stock owned or held by each of such persons, and also state the residence of such person or persons according to your best information.

35 4. State how much money or other property and how much stock in the Swan Land and Cattle Company, Limited, was distributed by the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company or any or either of them to their shareholders after

the sale of the herds of said three companies was completed, and to whom and in what amounts or proportions the same was distributed, and state when such distribution commenced and how it was carried on and when it was completed.

5. State if you attended any meeting of the trustees or shareholders of either of said three companies, the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, November 27, 1882; and, if so, state fully what took place thereat in reference to any of the matters or things set forth in the foregoing bill of complaint, and if you attended more than one of such meetings state what took place at each and all of said meetings.

6. Were you the secretary of the Swan and Frank Live Stock Company or of the trustees of said company November 27, 1882, or at any time thereafter?

7. Please state what is shown by the books of said company or either of them to have been done by the shareholders or trustees of said company on or after November 27, 1882, in reference to the matters and things or any of them set forth in the foregoing bill of complaint.

8. Please state what is shown by the books of said company or either of them in reference to the distribution among the shareholders of said company of the proceeds of the sale made by said company to the Swan Land and Cattle Company, Limited,
36 under the agreement of November 27, 1882, which is set forth in said bill of complaint.

9. Please state what is shown by said books or either of them in reference to the winding up of the affairs of said company.

10. Please state whether the books of said company or any of them were at the time of the filing of said bill of complaint in your custody or control; and, if not, state where the same were at that time and where the same now are.

11. Did not said company have an office in the city of Chicago between November 27, 1882, and May 1, 1883, or during some portion of that time, and were not the books of said company or some of them kept at such office, and did not such books or some of them show who were the shareholders in said company at that time.

12. Please state who were the shareholders of said company, as shown by such books or either of them, between November 27, 1882, and May 1, 1883, and how many shares of stock were held by each of said shareholders.

13. Do you not hold a number of shares of the capital stock of the Swan Land and Cattle Company, Limited, as trustee? If so, state the number of shares you so hold and the names of the persons for whom you hold the same in trust, and whether or not any of said persons were shareholders on or after November 27, 1882, in either of the three corporations named in the first general interrogatory.

14. Were you the secretary of the Swan, Frank and Anthony

Cattle Company or of the trustees of said company November 27, 1882, or at any time thereafter?

37 15. Please state what is shown by the books of said company or either of them to have been done by the shareholders or trustees of said company on or after November 27, 1882, in reference to the matters and things or any of them set forth in the foregoing bill of complaint.

16. Please state what is shown by the books of said company or either of them in reference to the distribution amongst the shareholders of said company of the proceeds of the sale made by said company to the Swan Land and Cattle Company, Limited, under the agreement of November 27, 1882, which is set forth in said bill of complaint.

17. Please state what is shown by said books or either of them in reference to the winding up of the affairs of said company.

18. Please state whether the books of said company or any of them were at the time of the filing of said bill of complaint in your custody or control; and, if not, state where the same were at that time and where the same now are.

19. Did not said company have an office in the city of Chicago between November 27, 1882, and May 1, 1883, or during some portion of that time, and were not the books of said company or some of them kept at such office, and did not such books or some of them show who were the shareholders in said company at that time?

20. Please state who were the shareholders of said company, as shown by such books or either of them, between November 27, 1882, and May 1, 1883, and how many shares of stock were held by each of said shareholders.

21. Were you the secretary of the National Cattle Com-
38 pany or of the trustees of said company November 27, 1882, or at any time thereafter?

22. Please state what is shown by the books of said company or either of them to have been done by the shareholders or trustees of said company on or after November 27, 1882, in reference to the matters and things or any of them set forth in the foregoing bill of complaint.

23. Please state what is shown by the books of said company or either of them in reference to the distribution amongst the shareholders of said company of the proceeds of the sale made by said company to the Swan Land and Cattle Company, Limited, under the agreement of November 27, 1868, which is set forth in said bill of complaint.

24. Please state what is shown by said books or either of them in reference to the winding up of the affairs of said company.

25. Please state whether the books of said company or any of them were at the time of the filing of said bill of complaint in your custody or control; and, if not, state where the same were at that time and where the same now are.

26. Did not said company have an office in the city of Chicago between November 27, 1882, and May 1, 1883, or during some portion of that time, and were not the books of said company or some

of them kept at such office, and did not such books or some of them show who were the shareholders in said company at that time?

27. Please state who were the shareholders of said company, as shown by such books or either of them, between November 27, 1882, and May 1, 1883, and how many shares of stock were held by each of said shareholders.

28. State how many shares of stock your deceased brother, Louis Snydacker, held or owned November 27, 1882, in the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company or any or either of said companies.

29. State what your brother Louis received from said companies or any or either of them, in money or in shares of stock in the Swan Land and Cattle Company, Limited, after November 27, 1882, and prior to his death.

30. State what you, as administrator upon the estate of your deceased brother Louis, have received from said companies or any or either of them, in money or in shares of stock in the Swan Land and Cattle Company, Limited, or in property, since the death of your said brother.

31. Please state how much money and how many of the shares of the capital stock of the Swan Land and Cattle Company, Limited, Amasa Converse, Charles E. Anthony, and Godfrey Snydacker, as trustees under the agreement of November 27, 1882, set forth in said bill of complaint, received from the proceeds of the sale under said agreement to said The Swan Land and Cattle Company, Limited, and please state what said trustees did with the money and stock thus received, and if they distributed the same or any part thereof give the names and residences of the persons to whom they distributed the same, and state how much money and how many shares of stock they distributed to each. If the same were not distributed by said trustees, but were turned over by them to some other person or persons or corporation for distribution, state to whom said trustee- turned over the same and to whom and in what sums the same were distributed by such person or persons or corporation.

32. Is your cotrustee, Amasa Converse, living; if not, when did he die? If he died before said trustees received and distributed the proceeds of said sale, please answer the thirty-first interrogatory as if the name of Amasa Converse were omitted therefrom.

(Exhibits A, B, C, D, E, H, and I are omitted as having no bearing upon any of the questions raised by demurrer.)

EXHIBIT F.

This agreement, dated the thirteenth day of February, eighteen hundred and eighty-three, between Alexander H. Swan, of Cheyenne, Wyoming, United States of America, attorney for and on behalf of the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, hereinafter

called "the three companies," conform- to powers of attorney or extract minutes by the three companies respectively in his favor, all dated thirteenth January, eighteen hundred and eighty-three, of the first part, hereinafter called "the first party;" the said Alexander H. Swan, for his individual interest, of the second part, hereinafter called "the second party," and James Wilson, of twenty-three Mayfield Gardens, Edinburgh, contracting on behalf of a limited liability company intended to be formed, of the third part, hereinafter called "the third party," witnesseth as follows, *videlicet*: Whereas by agreement dated the twenty-seventh day of November, eighteen hundred and eighty-two, between the three com-
41 panies and the third party, the three companies agree to sell to a limited liability company, to be formed by the third party, all and singular the lands and other property described in said agreement for the price and on terms therein set forth, by which agreement it was *inter alia* declared that if the third party should be unable to form the said limited liability company on or before the fourteenth day of February, eighteen hundred and eighty-three, then and in that case the said agreement was to be null and void the same as if it had never been made and all the parties thereto should be released from all the obligations thereunder; and whereas the first party has, by the powers of attorney or minutes aforesaid, been authorized and fully empowered, according to his best judgment and discretion, to consent to and make such alterations in or modifications on said agreement as he may think expedient and for the best interests of the three companies, except as to the matters specified in said powers of attorney or minutes; and whereas the parties to these presents have, in order to facilitate the formation of the said limited liability company, agreed on certain modifications of the terms of said purchase which they have resolved to reduce to writing: Therefore the parties have mutually agreed and do hereby agree and bind themselves each to the other as follows, *videlicet:*

First. The time allowed by said agreement to the third party for the organizing and forming of said limited liability company is hereby extended from the fourteenth day of February current to the fourteenth day of March, eighteen hundred and eighty-three, and the rights and powers conferred by said agreement upon the third party or flowing to him therefrom shall endure to said last-men-
42 tioned date to the same effect as if the said date had been substituted for the fourteenth day of February current in said agreement.

Second. In place of the price of two million five hundred and fifty-three thousand eight hundred and twenty-five dollars stipulated for by the three companies in said agreement being paid in three equal installments, ten, forty, and seventy days after the time fixed in said agreement for the formation of said limited liability company, *videlicet*, the fourteenth day of February current, said price shall be paid in four equal installments, *videlicet:* The first installment of six hundred and thirty-eight thousand four hundred and fifty-five dollars on the expiry of fourteen days after the date of the allotment

of the shares of said company to applicants, but not in any case later than the thirty-first day of March, eighteen hundred and eighty-three; the second installment of six hundred and thirty-eight thousand four hundred and fifty-five dollars two months after payment of the first installment, without interest; the third installment of six hundred and thirty-eight thousand four hundred and fifty-five dollars four months after payment of the first installment, with interest thereon at the rate of six per centum per annum from the date of payment of the first installment till paid, and the fourth installment of six hundred and thirty-eight thousand four hundred and sixty dollars six months after the date of payment of the first installment, with interest thereon at the rate of six per centum per annum from the date of payment of the first installment till paid; which payments shall be made to the parties and through the banks specified in said agreement after, but not in the case of any of said installments before the delivery stipulated by said agreement
43 to be made by the three companies to Isaac Bergman, Esquire, therein designed as escrow, nor before the deeds or instruments of transfer or conveyance by which said delivery is to be made are reported by a lawyer of standing in the United States of America, to be selected — the board of directors of said limited liability company, to be valid and sufficient and to have been granted by a party or parties holding a valid and unencumbered title, and the selection of the lawyer aforesaid shall be made and his instructions for examination of title given at the earliest possible period.

Third. The three companies shall be bound to subscribe for seven thousand nine hundred ten-pound shares of the capital stock of said limited liability company, the nominal amount of said shares being equal or nearly so to fifteen per cent. of the aforesaid price of two million five hundred and fifty-three thousand eight hundred and twenty-five dollars, and to pay in Chicago, United States, instalments on said shares on application and allotment, and thereafter calls thereon, all of the same amount and at the same periods as the other holders of shares in the said company.

Fourth. The second party agrees to subscribe for such numbers of the shares of the capital stock of the said limited liability company as shall, with the shares specified in the preceding article, make up in all ten thousand shares, and which additional shares the said company shall be bound to allot to him or his nominees on the same terms as regards payment as those on which the remaining shares of the capital stock shall be allot-ed; and he further agrees and undertakes that at least one-third of said ten thousand shares shall, if he so long live, be held by him partly in his own name and partly in the name of Joseph Frank, of Chi-
44 cago aforesaid, and shall not be transferred until the expiry of at least five years from the formation of the company.

Fifth. Whereas by said agreement it was provided that the representations in the inventories thereto annexed in regard to all property described and mentioned in said inventories, except the live stock, should be verified by a competent inspector or inspectors to be named by the third party as early as practicable and before the

execution of the conveyances mentioned in said agreement, and that deficiencies, if any, in said representations should be made good or supplied by the three companies, and, as to all live stock mentioned and described in said inventories, that the herd books of the three companies showing the acquisition, increase, disposition of, and number of cattle on hand of the three companies respectively had been truly and correctly kept: Now, it is hereby agreed between the first and third parties that the inspector or inspectors aforesaid shall be appointed by the board of directors of the limited liability company when formed, and that said board shall be bound to have said inspector or inspectors appointed and his or their inspection and report to the board made as soon as practicable after the formation of the company, and the report of said inspector or inspectors shall be final and conclusive and shall be binding upon the said three companies, which shall be bound, on its being communicated to them forthwith, to make good, to the satisfaction of the inspector or inspectors aforesaid, the deficiencies (if any) which said report may have declared to exist; and the second party guarantees that the land acquired by the three companies and to be acquired on behalf of the company to be formed as aforesaid shall at the close of the current year eighteen hundred and eighty-
45 three amount to ten thousand acres, and he undertakes to use his best endeavors to acquire a much larger amount of land for the company at the close of said year, as steps are at present being taken for that purpose.

Sixth. The second party agrees, on the formation of the said limited liability company, to assume, under the board of directors thereof, the post of general manager of the company's business in America, with his principal residence in the Territory of Wyoming, and, with the approval of the board, to retain said post for at least five years from the formation of the company, at a salary to be agreed on between him and the directors; and the board shall have power to require that the superintendence of the financial and bookkeeping department of the companies' affairs in America shall be undertaken by an official to be appointed and to be subject to removal by the board.

Seventh. The first party agrees with the third party that, in the event of said limited liability company being formed, the three companies shall bear one-half of all the costs of and incidental to the preparation and execution of this agreement and of the memorandum and articles of association of the company and of the registration thereof and of all stamps, fees, and legal expenses incident to the formation of the company, and generally of all preliminary expenses whatever incurred in relation to the company, the other half of said costs and expenses being borne by the company itself.

Eighth. The second party agrees with the third party that if said limited liability company shall not be formed on or before the fourteenth day of March, eighteen hundred and eighty-three, or
46 within such further extended period as may be allowed by the first party to the third party the second party shall pay to the third party in sterling money, in Edinburgh, Scotland, one-

half of the entire amount of the disbursements made and to be made by the third party, and of the professional and other charges and expenses which he has paid and may have to pay in connection with his endeavors to form said limited liability company, but without any remuneration for the third party's own personal trouble in connection with said business.

Ninth. In the event of any question arising in regard to the meaning of the agreement hereinbefore recited or of this supplementary agreement or the fulfillment thereof, the same is hereby referred to the final decision of John Blair Balfour, Esquire, advocate, Queen's counsel, her majesty's advocate for Scotland; whom failing, Alexander Asher, Esquire, Queen's counsel, her majesty's solicitor general for Scotland; whom failing, J. P. B. Robertson, advocate, as sole referee, whose decision shall be final and binding on the parties on the said limited liability company.

Tenth. The articles of association of the said limited liability company shall expressly recognize and confirm the agreement hereinbefore recited as modified by these presents, and shall bind the company to carry out the same, with such further modifications, if any, as may be agreed upon between the parties hereto, and upon the adoption of said agreement by the company the third party shall be discharged of all liability in respect thereof.

In witness whereof the parties hereto, after deletion of
47 twenty words in the twenty-third line, nine words in the twenty-fourth line, ten words in the thirty-second line, fifteen words in the thirty-third line, and eight words in the last line, all of the second page, and one word in the first line of the third page, have subscribed these presents the day and year first above written.

(Signed) A. H. SWAN.
(") A. H. SWAN.
(") JAS. WILSON.

Signed by the said Alexander H. Swan as attorney aforesaid and for his individual interest and by the said James Wilson in presence of—

(Signed) WM. STUART FRASER,
Of No. 16 Castle Street, Edinburgh,
Writer to the Signet, Witness.

(Signed) ROBERT URQUHART,
Of No. 16 Castle Street, Edinburgh,
Clerk, Witness.

This is the supplementary agreement referred to in minute of adoption by the Swan Land and Cattle Company, Limited, having its registered office at number one hundred and thirty George street, Edinburgh, Scotland, of even date herewith.

In witness whereof these presents, written by William John Paterson, clerk to Fraser, Stodart & Ballingall, writers to the signet, Edinburgh, are executed by us at Edinburgh, the said company, as follows, viz: They are subscribed for and on behalf of our said company by Colin James Mackenzie, of Portmore, and James Shepherd, manufact-

urer, Kirkcaldy, two of our directors, and by Finlay Dun, our secretary, and are sealed with our common or corporate seal, all as authorized by minute of meeting of the board of directors of said company held on the twenty-second day of May, eighteen hundred and eighty-three, on the twenty-fourth day of the same month and year,
48 before these witnesses: The said William John Paterson and Thomas Murray, clerk to the said The Swan Land and Cattle Company, Limited.

(Signed) COLIN J. MACKENZIE, *Director.*
(") JAS. SHEPHERD, *Director.*
(") FINLAY DUN, *Secretary.*

(Signed) W. J. PATERSON, *Witness.*
(") THOMAS MURRAY, *Witness.*

EXHIBIT G.

This agreement, dated the ninth day of March, eighteen hundred and eighty-three, between Alexander H. Swan, of Cheyenne, Wyoming, United States of America, attorney for and on behalf of the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, hereinafter called "the three companies," conform- to powers of attorney or extract minutes by the three companies respectively in his favor, dated thirteenth January, eighteen hundred and eighty-three, of the first part, hereinafter called "the first party;" the said Alexander H. Swan, for his individual interest, of the second part, hereinafter called "the second party," and James Wilson, of twenty-three Mayfield Gardens, Edinburgh, Scotland, of the third part, hereinafter called "the third party," witnesseth as follows, viz: Whereas, in pursuance of his undertaking in the agreement between the three companies and him, dated the twenty-seventh day of November, eighteen hundred and eighty-two, the third party has
49 since his return to Great Britain from America, taken steps towards the formation of a limited liability company, hereinafter called "the company," to acquire the property of the three companies specified in said agreement, and he is still continuing his endeavors to form said company; and whereas the first party has, by supplementary agreement dated thirteenth February, eighteen hundred and eighty-three, agreed to extend the time for the formation of the company from the fourteenth day of February to the fourteenth day — March, current, as well as the period for the payment of the price of said property; and whereas it is proper that certain other matters which the said parties have resolved upon should be reduced to writing, therefore it is hereby agreed as follows, viz:

1. The first party agrees with the third party that the company shall be formed on the basis of the prospectus and memorandum and articles of association, of each of which a printed copy is signed by the parties of even date herewith as relative hereto.

2. The first party agrees that the interest stipulated by the second

article of the aforesaid supplementary agreement to be paid on the third and fourth instalments of the price of said property shall, notwithstanding anything to the contrary in said supplementary agreement, commence to run from the fifteenth day of May, eighteen hundred and eighty-three.

3. The first party agrees that, notwithstanding anything to the contrary contained in the supplementary agreement before mentioned, the several instalments or calls to be paid in respect of the shares in the company agreed to be subscribed for by the three companies and the second party, in terms of the third and fourth articles of said supplementary agreement, shall be payable in
50 London on the days on which the respective payments for said shares shall be due.

4. The second party agrees to accept a salary at the rate of ten thousand dollars per annum as remuneration for his services as general manager of the company's business in America, which position he has agreed to assume and retain for at least five years from the thirty-first day of March current, the first payment thereof to be made on thirtieth June next for the proportion then due, and the next payment on thirty-first December following for the half year preceding, and thereafter half yearly at said dates, such salary to cover all his personal expenses, except his traveling expenses when he may be required to leave the Territory of Wyoming on the business of the company; and while he shall not be bound to devote his whole time to the service of the company, he shall not be entitled to engage in any work antagonistic to the company or which may in any way interfere with the right discharge of his duties as general manager aforesaid.

5. The second party undertakes to do everything necessary to secure that the land acquired and in process of being acquired by the three companies aforesaid, and to be acquired or to be under process of being acquired on behalf of and by the company, and which, by said supplementary agreement, he guaranteed should amount at the close of the current year eighteen hundred and eighty-three to ten thousand acres, shall, at said date, amount to fifteen thousand acres, which, when acquired, shall belong to the company in absolute freehold property, and the necessary payments in connection with the acquisition of said lands falling due
51 after thirty-first December, eighteen hundred and eighty-two, shall be paid by the company.

6. The first party agrees that if the calves branded in the year eighteen hundred and eighty-three on behalf the company as the calves of the herds sold to it by the three companies shall be fewer in number than seventeen thousand eight hundred and sixty-eight head the three companies shall jointly and severally be bound to pay to the company in New York thirty-one dollars sixty-eight cents United States currency for each head of the calves deficient—that is, fewer in number than seventeen thousand eight hundred and sixty-eight head—and which payment shall be due on the thirty-first day of December, eighteen hundred and eighty-three; and if any question shall arise between the three companies and the

company as to whether such deficiency exists or as to the amount of such deficiency the question, unless arranged by the parties themselves, shall be settled by the referees named in the supplementary agreement; and it is hereby specially provided and declared that nothing in the foresaid supplementary agreement or in these presents shall be held to impair to any extent the guarantee by the three companies in said original agreement as to the herd books having been truly and correctly kept.

7. The first party agrees that all purchases and sales of live stock made by the three companies from and after twenty-seventh November, eighteen hundred and eighty-two, shall be held to have been made for or by the company, as the case may be, and the prices of such purchases shall be debited to the company and the proceeds of such sales accounted for to the company, as the case may be.

52 8. The company shall have no concern with and shall not be liable for the application of the price to be paid for the property agreed to be purchased by the company after the several instalments of the said price have been respectively paid into the banks mentioned in said agreement of twenty-seventh November, eighteen hundred and eighty-two, to the credit of the trustees therein named, but shall be fully exonered and discharged by the receipts of said banks for the sum paid to them respectively.

9. The first party agrees that it shall be left to the parties named in said prospectus as the directors of the company to decide whether a sufficient number of shares have been applied for to justify them in incorporating the company by the registration of the memorandum and articles of association, and in the event of their deciding it at any time after the issue of the prospectus that sufficient time has been allowed for the lodging of applications, and that there has not been such a number of shares applied for as would justify them in incorporating the company, their decision shall be binding on the parties to these presents, and in that case neither the first party nor the three companies or any of them shall have any claim against the third party, nor shall the third party have any claim against the three companies or any of them for compensation or expenses or otherwise in relation thereto; further, the first party extends the time allowed by said agreement and supplementary agreement for the organizing and forming the company from the 14th day of March current to the 31st day of the same month.

In witness whereof the parties hereto have subscribed these presents the day and year first above written.

Signed by the said Alexander H. Swan, as attorney,
53 "Alexander H. Swan" foresaid and for his individual interest, and by the said James "Alexander H. Swan" Wilson in the presence of "Wm. Stuart Fraser," of Castle street, Edinburgh, writer to the signet, witness.

"JAS. WILSON."

"ROBERT URQUHART,"
Of 16 *Castle Street, Edinburgh, Law Clerk, Witness.*

"The Swan Land & Cattle Company, Limited, having its registered office at number one hundred and thirty George street, Edinburgh, Scotland, hereby adopts the agreement, dated twenty-seventh November, dated eighteen hundred and eighty-two, specified in the before-written additional agreement, as said first-mentioned agreement is modified by the supplementary agreement dated thirteenth February, eighteen hundred and eighty-three, also before specified, and by said additional agreement to the effect of said agreement, modified as aforesaid, becoming a contract of the company, thereby acquiring all the rights conferred by said three deeds on James Wilson, therein designed, and becoming liable to fulfill all the obligations thereby imposed upon him, so far as not already implemented. In witness whereof these presents, written by William John Paterson, clerk to Fraser, Stodart and Ballingall, writers to the signet, Edinburgh, are executed at Edinburgh by us, the said company, as follows, viz: The- are subscribed for and on behalf of our said company by Colin James Mackenzie, of Portmore, and James Shepherd, manufacturer, Kirkcaldy, two of our directors, and by Finlay Dun, our secretary, and are sealed with our common or corporate seal, all as authorized by minute of meeting of the board of directors of said company held on the twenty-second day of May, eighteen hundred and eighty-three, on the twenty-fourth day
54 of the same month and year, before these witnesses, the said William John Paterson and Thomas Murray, clerk to the said The Swan Land and Cattle Company, Limited.

"COLIN J. MACKENZIE, *Director.*
"JAS. SHEPHERD, *Director.*
"FINLAY DUN, *Secretary.*

"W. J. PATERSON, *Witness.*
"THOMAS MURRAY, *Witness.*"

55 EXHIBIT H.

The list of applications for shares will be closed on or before Monday, 26th March current.

The Swan Land and Cattle Company, Limited; to be incorporated under the companies acts, 1862 to 1880, whereby the liability of shareholders is limited to the amount of their shares.

Capital £600,000, in 60,000 shares of £10 each, of which £100,000 will be subscribed for by the vendors and at least £100,000 by the directors and their friends.

The qualification for a director is £5,000; £1 per share, payable on application, £1 on allotment, £2 on 15th May, and £2 on 16th July. It may not be necessary to make further calls, as the directors propose to issue debentures not exceeding the unpaid capital and bearing interest at 6 per cent. Before issuing these an opportunity will be given to shareholders of paying the uncalled portion

of their shares, which, so long as uncalled, shall not share profits, but bear interest at 6 per cent.

Directors: Colin J. Mackenzie, Esq., of Portmore (director of the British Linen Company bank), chairman; Lord Douglas Gordon, M. P., London; William Anderson, Esq., chartered accountant, Glasgow; Hugh Beckett, Esq., Glasgow (director of Nobel's Explosives Company, Limited); James Shepherd, Esq., manufact-
56 urer, Kirkcaldy; James Wilson, Esq., Edinburgh, formerly merchant, China (will join the board after the transfer of the property); Alexander H. Swan, Esq., Cheyenne, Wyoming, U. S. A.

Bankers: The British Linen Company bank, Edinburgh, 41 Lombard street, London, E. C., and branches.

Brokers: Messrs. Bell, Begg & Cowan, 8 North St. David street, Edinburgh; Messrs. Kerr, Andersons, Muir, and Main, 149 West George street, Glasgow.

Solicitors: Messrs. Fraser, Stodart & Ballingall, W. S., 16 Castle street, Edinburgh.

Auditors: Messrs. Howden & Malleson, C. A., 5 North St. David street, Edinburgh.

Manager in America: Alexander H. Swan, Cheyenne.

Interim secretary: Wm. Stuart Fraser, W. S.

Temporary offices: 16 Castle street, Edinburgh.

Prospectus.

This company is formed to acquire the well-known cattle herds and ranches which belong to three companies, viz., the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, all in the Ter-
57 ritory of Wyoming, United States of America, and to carry on the business of raising cattle and other live stock in the United States of America.

Mr. Alexander H. Swan, the present manager of the ranches and of the vendors, was trained as a farmer and cattle-raiser in the Eastern States, and started business about ten years ago as a stock-raiser in Wyoming. He is now extensively known as one of the most successful and able ranche managers and one of the best judges of cattle in America. He has paid special attention to improving the breed of his cattle and making those range improvements, such as acquiring water rights, enclosing hay meadows, and fencing cow pastures, which are calculated at once to benefit the herd and increase the control of the grazing grounds within the limits of the range.

The object of transferring the herds to a single company with sufficient capital is to extend the improvements and develop the herds, which, combined, will form one of the largest, as they are already well known to be the best-graded herd of any magnitude on the plains.

As a proof of this it may be mentioned that the average nett price realized during 1882 for the companies' steers, including old and barren cows, after deducting freight to market and all sale expenses, was $43.36 per head.

The business of cattle-raising in the Western States of America is now acknowledged to be highly remunerative. Numerous
58 companies have lately been formed for carrying it on and are working very successfully.

It is hardly necessary to point out that the formation of new companies does not tend to over-production, as in the case of some other industries; it only systematises and lessens the expense of the working of the ranches.

The information given in this prospectus is largely taken from a report by Mr. Thomas Lawson, farmer, Sandyford, Scotland, a practical agriculturist, who has had great experience in the inspection of ranches in the United States and also in Mexico. Mr. Lawson was requested by Mr. James Wilson, Mayfield Gardens, Edinburgh, to examine and report to him on the Swan ranches and herds.

He had previously visited the ranches in June, 1882, but went to see them again in company with Mr. Wilson last November, and having visited all the headquarters and inspected the improvements, made a full report thereon to him.

Mr. Lawson has thus had special opportunities for forming an opinion of the cattle and the ranches.

He describes the range as lying within the counties of Laramie, Albany, and Carbon, in the Territory of Wyoming; as extending to 130 miles from east to west, with a breadth increasing from 42 miles at the east end to about 100 miles at the west end, and watered in every part with rivers, creeks, springs, and spring branches, affording an ample and convenient supply of water both summer
59 and winter. Lands commanding the best portion of the water rights have already been secured, which, coupled with the size of the herds, give the practical command of the range.

The range varies in elevation above the sea level, the whole being above what is called the "rain line," and having thus the benefit of a dry and bracing climate.

In winter the snow is dry and powdery, and is swept aside by the wind instead of covering up the grazing, as it does in lower and damp situations.

The surface is diversified, embracing smooth rolling prairie, broken and bluffy ground, and in some parts hilly and mountainous country, with sheltered valleys and creeks.

Its grazing is of a high order, supplying abundant and nutritious feeding at all seasons, and Mr. Swan has no doubt that it could graze and fatten 150,000 cattle.

Mr. Lawson estimates its grazing capacity at even a higher figure. The Union Pacific railroad traverses the west centre of the range for about 80 miles, thus giving unusual facilities for conveying the stock to market.

The advantages of the range are summed up by Mr. Lawson as follows:

"The Swan range cannot be surpassed in Wyoming either for water, shelter, or pasture, and I have yet to see any similar extent in that or any other Territory as well situated naturally for a combination of all three."

60 A detailed statement is given in the inventories attached to the agreement hereinafter mentioned of the lands proposed to be acquired by the company, and of the improvements already on the range, consisting of conveniently situated houses, barns, stables, corrals, irrigation lands, and 130 miles of fencing.

The securing of additional land and the making of further improvements will be proceeded with as soon as the company is formed.

Detailed inventories, with classification of the entire live stock of cattle and horses of the three companies, are contained in copies of the herd books, showing the stock at the organization of each company, with the purchases and sales for each year, all sworn to by the book-keepers and certified by the secretaries of the companies.

These copies of the herd books have been examined, and in the case of the two older companies have also been compared with the business books of Messrs. Howden & Molleson, chartered accountants, Edinburgh, who certify that the books are well kept, and that the attested copies of the herd books substantially agree with the business books.

Mr. Lawson describes the cattle as almost all northern and western of good grades.

Four years ago Hereford bulls were introduced, and now one-half of the bulls on the range are either throughbred or grade
61 bulls, and the herds he considers are "the best graded herds of any consequence in America."

This year (1883) will be the first in which the Hereford cross will begin to tell in improving the sales. By next year, he says, the herd will "not only be able to breed its own bulls, but have these to sell a year old at long figures." He speaks highly of Mr. Swan's systematic, judicious, and economical management.

Mr. Swan states that half a dollar per head of the herd will cover the entire annual outlay for running expenses on the range from the expenditure being reduced to a minimum through the great extent of the herds.

Mr. Swan's submanagers are reputed to be good and responsible men, and, having already an interest in the business, some of them to a considerable amount, will take shares in the company.

The price at which the entire property, consisting of all the live stock belonging to the three companies, with their lands, water rights, improvements, grazings, and other possessory privileges, goods, and chattels, &c., is offered to the company is as follows:

		which, at $4.85 per £, is equal to	
87,507 cattle, at $25 per head	$2,187,675		£451,067
1,660 bulls, at $75 per head	124,500		25,670
833 mules and horses, at $50 per head	41,650		8,588
Ranches, with freehold land, buildings, fencing, and other improvements, implements, &c.	200,000		41,237
62	$2,553,825		£526,562

At the above price Mr. Lawson states he "would consider the property very good value," and, in another part of his report, "the

cheapest property of the kind which I have seen this season." The price is to be paid in New York in five equal instalments, payable within six months from the date of allotment, the last two instalments bearing six per cent. interest from 15th May next.

Mr. Swan agrees to give his services to the company as its manager in America for at least five years, at a salary of $10,000 per annum, and he and his partners have agreed to subscribe for 10,000 shares (£100,000) in the company, which will be paid for by the same instalments as in the case of the other shareholders, and he personally undertakes that one-third of these shares will be held by him and Mr. Joseph Frank, one of the largest shareholders in the three companies, for the five years during which he undertakes the management.

Mr. Swan has prepared a series of estimates showing the profits from sales which may probably be derived from the working of the company during the next eight years. The results brought out are encouraging in the highest degree and show a large and yearly increasing return to the shareholders, without taking into account the value of the annual increase of the cattle, which may be
63 expected to double their number within the next ten years.

The only agreements entered into on behalf of the company are as specified in the memorandum of association: (1) an agreement dated 27th November, 1882, between the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, of the first part, and James Wilson, of 23 Mayfield Gardens, Edinburgh, of the second part; (2) a supplementary agreement, dated 13th February, 1883, between Alexander H. Swan, attorney for said three companies, of the first part, the said Alexander H. Swan for his individual interest, of the second part, and the said James Wilson, of the third part, and (3) additional agreement between the said Alexander H. Swan, attorney aforesaid, the said Alexander H. Swan for his individual interest, and the said James Wilson, dated 9th March, 1883.

By these agreements the said three companies, as vendors, *inter alia*, agree to sell their herds and ranches aforesaid to the said James Wilson, on behalf of this company, at the price and on the terms therein mentioned, the sale taking effect from 31st December, 1882, after which date all outgoings are to be paid by and all profits or increase of value are to belong to this company.

The agreements provide for the appointment by the board
64 of an inspector, who shall verify the representations in the inventories as to the property described therein other than the live stock, and whose report shall be conclusive, and the vendors agree to make good any deficiencies which such report may declare to exist. They further, as to the live stock, guarantee that the herd books of the vendors showing the acquisitions, increase, disposition of, and number of cattle on hand at the date of the purchase have been truly and correctly kept.

In addition, the directors have received information from various independent sources regarding the quality of the range, the numbers of the cattle, and the status of the vendors, and have satisfied

themselves that the representations made to them on these points are substantially correct.

The agreements further provide for the appointment by the board of a lawyer of standing in the United States, who shall report that the vendors' title to the property to be acquired is valid and unencumbered and that the deeds of conveyance thereof are valid and sufficient before any part of the price is paid.

The vendors agree to pay one-half of the preliminary expenses connected with the formation of the company up to and including allotment, exclusive of the commission aftermentioned.

65 No promotion money is being paid and neither the vendors nor their associates acquire any preference over the other shareholders, either through sharing surplus profits or by obtaining deferred or contingent interests or otherwise, but Mr. Wilson shall receive from the company one per cent. on its nominal capital of £600,000, as remuneration for his trouble and responsibility in connection with the acquisition of the property and the formation of the company.

Copies of the agreements and relative inventories, memorandum and articles of association, herd books, Mr. Lawson's report, Mr. Swan's estimates, and Messrs. Howden & Molleson's report may be seen at the offices of the brokers and solicitors.

And forms of application for shares may be obtained there or from the company's bankers.

The 10,000 shares subscribed for by the vendors shall be allotted in full, and each director shall be entitled to an allotment in full not exceeding 1,500 shares. Allotment in all other cases shall be substantially in proportion to the amounts applied for.

If no allotment is made the application money will be returned in full.

16 Castle street, Edinburgh, 13th March, 1883.

66 *Prospectus.*

The Swan Land and Cattle Company, Limited.

Capital, £600,000 in 60,000 shares of £10 each; each director's qualification, £5,000.

Directors: Colin J. Mackenzie, Esq., of Portmore (director of the British Linen Company bank), chairman; Lord Douglas Gordon, M. P., London; William Anderson, Esq. C. A., Glasgow; Hugh Beckett, Esq., Glasgow (director of Nobel's Explosives Company, Limited); James Shepherd, Esq., manufacturer, Kirkcaldy; James Wilson, Esq., Edinburgh, formerly merchant, China; Alexander H. Swan, Esq., Cheyenne, Wyoming, U. S. A. (will join the board after the transfer of the property).

Bankers: The British Linen Company bank, Edinburgh, 41 Lombard street, London, E. C., and branches.

67 Brokers: Messrs. Bell, Begg & Cowan, 8 North St., David street, Edinburgh; Messrs. Kerr, Andersons, Muir and Main, 149 West George street, Glasgow.

Solicitors: Messes. Frasee, Stodart & Ballingall, W. S., 16 Castle street, Edinburgh.

Auditors: Messes. Howden & Molleson, C. A., 5 North St., David street, Edinburgh.

Manager in America: Alexander H. Swan, Esq., Cheyenne.

Interim secretary: Wm. Stuart Fraser, W. S.

Temporary offices, 16 Castle street, Edinburgh.

Memorandum of Association.

I. The name of the company is "The Swan Land and Cattle Company, Limited."

II. The registered office of the company will be situate in Scotland.

III. The objects for which the company is established are:

(1.) To take over the purchase of and acquire the herds, ranches, and others described in an agreement between the Swan and Frank Live Stock Company, by Alexander H. Swan, Thomas Swan, Joseph
Frank, Godfrey Snydacker, Joseph Rosenbaum, and Charles
68 E. Anthony, its agents and trustees; the National Cattle Company, by Amasa R. Converse, Alexander H. Swan, Thomas Swan, Godfrey Snydacker, Joseph Rosenbaum, Morris Rosenbaum, and T. B. Hicks, its agents and trustees, and the Swan, Frank and Anthony Cattle Company, by Alexander H. Swan, Thomas Swan, Charles E. Anthony, Joseph Frank, and Zachariah Thomasson, its agents and trustees, all of said corporations having been duly created and now existing under and by virtue of the laws of the Territory of Wyoming, United States of America, of the first part, and James Wilson, of 23 Mayfield Gardens, Edinburgh, Scotland, on behalf of himself and others to be associated with him, of the second part, dated 27th November, 1882, as modified by a supplementary agreement between the said Alexander H. Swan, attorney for and on behalf of said three companies, of the first part, the said Alexander H. Swan, for his individual interest, of the second part, and the said James Wilson, of the third part, dated 13th February, 1883, and an additional agreement between the said Alexander H. Swan, attorney aforesaid, him for his individual interest, and the said James Wilson, dated 9th March, 1883, and to adopt and carry out said agreements, either in their present form or with such modifications as may be agreed on by the vendors or their attorney and the company.

69 (2.) To buy, breed, graze, and sell cattle, sheep, hogs, horses, mules, and other live stock, or deal in dead meat or in manufacturing, converting, and rendering marketable these or the other agricultural products of the country in the United States of America and elsewhere, and to become carriers by land or water for the purposes aforesaid.

(3.) To acquire by purchase or under lease or otherwise land and other real estate, property, and chattels in the United States of America and elsewhere; to hold, clear, cultivate, manage, stock,

improve, build on, and develop, and to sell, mortgage, lease, or otherwise deal with the same.

(4.) To borrow or raise money for the general purposes of the company on such security, including uncalled capital, as may be thought fit by way of debenture or mortgage, terminable, redeemable, or perpetual, or conveyance, absolute or in trust, with power of sale, or by the creation of preference and debenture stock, or in any other way or manner; to lend money on the security of any land or other real estate, property, chattels, and others sold by the company, and to sell or dispose of any mortgage or other securities taken or held by the company, with or without the guarantee of the company for the monies thereby due, and to invest money not immediately required for the purposes of the company in or lend the same upon the security of any stocks or shares (not involving liability for future calls), bonds, debentures, or other securities in the United Kingdom or United States of America, and also to lodge money temporarily in bank in the United Kingdom or United States of America.

(5.) To purchase or sell or draw or endorse bills of exchange or promissory notes in the course and for the purpose of the business of the company.

(6.) To purchase or acquire the business or undertaking of any company or individual having objects or carrying on business similar to those of this company or to amalgamate with any such company or to sell the whole undertaking of the company or any part thereof to a company or to an individual or individuals on such terms and conditions as the company may deem proper.

(7.) To incorporate or register the company in the United States of America.

(8.) To do all matters or things whatsoever incidental or conducive to any of the aforesaid objects.

IV. The liability of the members is limited.

V. The nominal capital of the company is £600,000, divided into 60,000 shares of £10 each, with power to increase and to reduce capital as provided by the articles of association.

71 EDINBURGH, *9th March*, 1883.

Signed as relative to additional agreement between:

(1.) Alexander H. Swan, as attorney for the Swan & Frank Live Stock Company and others;

(2.) The said Alexander H. Swan, for his individual interest; and,

(3.) James Wilson, of twenty-three Mayfield Gardens, Edinburgh, of even date herewith.

(S'g.) ALEXANDER H. SWAN.
(") ALEXANDER H. SWAN.
(") JAS. WILSON.

72 EXHIBIT I.

The Swan Land and Cattle Company, Limited, incorporated 30th March, 1883.

Memorandum and Articles of Association.

The companies acts, 1862 to 1880.

Company limited by shares.

Memorandum of Association of the Swan Land and Cattle Company, Limited.

I. The name of the company is "The Swan Land and Cattle Company, Limited."

II. The registered office of the company will be situate in Scotland.

III. The objects for which the company is established are:

(1.) To take over the purchase of and acquire the herds, ranches, and others described in an agreement between the Swan and Frank Live Stock Company, by Alexander H. Swan, Thomas Swan, Joseph Frank, Godfrey Snydacker, Joseph Rosenbaum, and Charles E. Anthony, its agents and trustees; the National Cattle Company, by Amasa R. Converse, Alexander H. Swan, Thomas Swan, Godfrey Snydacker, Joseph Rosenbaum, Morris Rosenbaum, and T. B. Hicks, its agents and trustees, and the Swan, Frank and Anthony Cattle Company, by Alexander H. Swan, Thomas Swan, Charles E. Anthony, Joseph Frank, and Zachariah Thomasson, its
73 agents and trustees, all of said corporations having been duly created and now existing under and by virtue of the laws of the Territory of Wyoming, United States of America, of the first part, and James Wilson, of 23 Mayfield Gardens, Edinburgh, Scotland, on behalf of himself and others to be associated with him, of the second part, dated 27th November, 1882, as modified by a supplementary agreement between the said Alexander H. Swan, attorney for and on behalf of said three companies, of the first part, the said Alexander H. Swan, for his individual interest, of the second part, and the said James Wilson, of the third part, dated 13th February, 1883, and an additional agreement between the said Alexander H. Swan, attorney -foresaid, and the said James Wilson, dated 9th March, 1883, and to adopt and carry out said agreements either in their present form or with such modifications as may be agreed on by the vendors or their attorney and the company.

(2.) To buy, breed, graze, and sell cattle, sheep, hogs, horses, mules, and other live stock, or deal in dead meat or in manufacturing, converting, and rendering marketable these or other agricultural products of the country in the United States of America and elsewhere, and to become carriers by land or water for the purposes aforesaid.

(3.) To acquire by purchase or under lease or otherwise land and other real estate, property, and chattels in the United States of America and elsewhere; to hold, clear, cultivate, manage, stock, improve, build on, and develop, and to sell, mortgage, lease, or otherwise deal with the same.

(4.) To borrow or raise money for the general purposes of the company on such security, including uncalled capital, by way of debenture or mortgage, terminable, redeemable, or perpetual, or conveyance, absolute or in trust, with power of sale, or by the creation of preference and debenture stock, or in other way or manner; to lend money on the security of any land or other real estate, property, chattels, and others sold by the company, and to sell or dispose of any mortgage or other securities taken or held by the company, with or without the guarantee of the company for the monies thereby due, and to invest money not immediately required for the purposes of the company in or lend the same upon the security of any stocks or shares (not involving liability for future calls), bonds, debentures, or other securities in the United Kingdom or United States of America, and also to lodge money temporarily in bank of the United Kingdom or United States of America.

(5.) To purchase or sell or draw or indorse bills of exchange on promissory notes in the course and for the purposes of the business of the company.

(6.) To purchase or acquire the business or undertaking of any company or individual having objects or carrying on business similar to those of this company or to amalgamate with any such company or to sell the whole undertaking of the company or any part thereof to a company or to an indvidual or individuals on such terms and conditions as the company may deem proper.

(7.) To incorporate or register the company in the United States of America.

(8.) To do all matters or things whatsoever incidental or conducive to any of the aforesaid objects.

IV. The liability of the members is limited.

V. The nominal capital of the company is £600,000, divided into 60,000 shares of £10 each, with power to increase and to reduce capital as provided by the articles of association.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names:

Names, addresses, and descriptions of subscribers.	Number of shares taken by each subscriber.
Colin J. Mackenzie, Portmore, Eddleston, N. B., landed proprietor	One.
Jas. Shepherd, Rossend castle, Burntisland, manufacturer	One.
Douglas Gordon, 22 Half Moon street, London, gentleman	One.
Jas. Wilson, 23 Mayfield Gardens, Edinburgh, no occupation	One.
H. Beckett, 3 Windsor terrace, West Glasgow, merchant	One.
Wm. Anderson, C. A., Glasgow	One.
Wm. Stuart Fraser, of 16 Castle street, Edinburgh, writer to the signet	One.

Dated the 30th day of March, 1883.

Witness to the above signatures:
ROBERT URQUHART,
Law Clerk, 16 *Castle Street, Edinburgh, Witness.*

77 *Articles of Association of the Swan Land and Cattle Company, Limited.*

1. The regulations contained in the table marked A in the first schedule to "the companies act, 1862," shall not apply to the company.

Interpretation.

2. In these presents, unless there be something in the subject or context inconsistent therewith—

"The company" means the Swan Land and Cattle Company, Limited.

"The office" means the registered office for the time being of the company.

"These presents" means the memorandum and articles of association for the time being in force.

"Month" means calendar month.

"In writing" means written or printed or partly written and partly printed.

"Member" means shareholder.

Words importing the singular include the plural, and *vice versa.*

Words importing the masculine include the feminine.

Words importing persons include corporations and companies.

Business.

3. The business of the company shall include the taking
78 over, the purchase of, and acquiring, improving, and otherwise dealing with the herds, ranches, and others referred to in the memorandum of association and the carrying out of all the other objects for which in the memorandum of association the company is stated to be established.

4. The directors shall not employ the funds of the company or any part thereof in the purchase of shares in the company.

5. The registered holders of shares in the company for the time being, whatever the number issued or subscribed for, shall be associated and shall form the company, and the business of the company may be commenced as soon as the directors think fit.

Ratification of contract.

6. The company shall adopt and give effect to the agreement between the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, of the first part, and James Wilson, of 23 Mayfield Gardens, Edinburgh, Scotland, of the second part, dated 27th November, 1882, mentioned in the memorandum of association as modified by the supplementary agreement of 13th February, 1883, and the additional agreement of 9th March, 1883, both also mentioned in said memorandum of association, and shall implement the obligations in said agreements incumbent on the said James Wilson, and
79 shall have all the rights conferred on him thereby, and the seal of the company shall be affixed to said three agreements, so as to constitute them contracts of the company.

Capital and increase thereof.

7. The original capital shall be £600,000, divided into 60,000 shares of £10 each.

8. The company, in general meeting specially convened for the purpose, may from time to time increase the capital by the creation of new shares of such number and amount as the meeting may determine.

9. The new shares shall be issued upon such terms and conditions and with such rights and privileges annexed hereto as the general meeting resolving upon the creation thereof shall direct and, if no direction be given, as the directors shall determine, and in particular such shares may be issued with the preferential or qualified right to dividends and in the distribution of the assets of the company and with a special or without any right of voting.

10. Such general meeting may, before the issue of any new shares, determine that the same or any of them shall be offered in the first instance to all the then members in proportion to the amount of the capital held by them or make any other provisions as to the issue and allotment of the new shares and as to how
80 the premium, if any, on such shares shall be applied, but in default of any such determination or so far as the same shall

not extend the right of issue and allotment of the new shares shall be in the directors.

11. Except so far as otherwise provided by the conditions of issue by these presents any capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the provisions herein contained with reference to the payment of calls and installments, transfer and transmission, forfeiture, surrender, and otherwise.

Shares and calls.

12. Subject to the provisions of clauses 9 and 10 hereof the shares shall be under the control of the directors, who may allot the same to such persons, on such terms and conditions, and at such times as they think fit.

13. Every person who has accepted any share in the company and whose name is entered in the register of members and no other person shall be deemed to be a member.

14. If several persons are registered as joint holders of any share any one of such persons may give effectual receipts for any dividends in respect of such share.

15. If by the conditions of allotment of any share the whole or part of the amount thereof shall be payable by instalments
81 every such instalment shall, when due, be paid to the company by the holder of the share.

16. The joint holders of a share shall be severally as well as jointly liable for the payment of all installments and calls due in respect of such share.

17. Every member shall be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon, without being required to make any payment for such certificate.

18. If such certificate is worn out or lost it may be renewed on payment of one shilling, and on the shareholder receiving such new certificate undertaking to indemnify the company against all loss occasioned to the company by the issuing thereof.

19. The certificates of shares registered in the names of two or more persons shall be delivered to the person first named on the register.

20. The directors may, from time to time, make such calls upon the members, in respect of all monies unpaid on their shares, as they think fit, provided that one month's notice, at least, is given of each call and each member shall be liable to pay the amount of the calls so made to the persons and at the times and places appointed by the directors.

21. On the trial or hearing of any action by the company
82 against any member to recover any debt due in respect of any call or interest thereon, it shall be sufficient to prove that the name of the defendee is entered on the register as the holder or one of the holders of the number of shares in respect of which such debt accrued, and that a resolution of the directors was passed

making such call, but it shall not be necessary to prove any other fact.

22. A call shall be deemed to have been made at the time when the resolution of the directors making such call was passed, unless another date shall be fixed by the resolution.

23. The directors may, from time to time, at their discretion, extend the time fixed for payment of any call, and may extend such time as to all or any of the members whom, from residence beyond the sea or other causes, the directors deem fairly entitled to such extension, but no member shall be entitled to any such extension, which shall be given only as a matter of grace and favor.

24. If the call payable in respect of any share is not paid before or on the originally appointed or extended time for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same from the originally appointed or the extended time for the payment thereof to the time of the actual pay-
83 ment at such rate as shall be fixed by the directors when making the call not exceeding 10 per cent. per annum.

25. The directors may receive from any member willing to advance the same and upon such terms and conditions as they think fit all or any part of the monies due upon the shares held by him beyond the sums actually called up, and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as may be agreed upon.

Transfer and transmission of shares.

26. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof.

27. The instrument of transfer of any share may be in the following form or as near thereto as circumstances will admit:

I, A B, of ——, in consideration of the sum of —— paid
84 to me by C D, of ——, do hereby transfer to the said C D the share (or shares) numbered —— standing in my name in the books of "The Swan Land and Cattle Company (Limited)," to hold unto the said C D, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof, and I, the said C D, do hereby agree to take the said share (or shares) subject to the same conditions.

As witness our hands the — day of ——.

The signature of the transferor and of the transferee may be attested by one witness only.

28. The instrument of transfer shall be presented to the company with a fee of 2*s.* 6*d.* for recording the same and accompanied with

such evidence as the directors may require to prove the title of the transferor, and when the transfer has been approved of the instrument of transfer shall be retained by the company as its own property.

29. The register and transfer books of the company shall be closed during the fourteen days immediately preceding the annual general meeting in each year.

30. The executors or administrators of a deceased member not being one of several joint holders, and in the case of joint
85 holders the survivors or survivor of them, shall be the only persons recognized by the company as having any title to the shares registered in the name of such member.

31. Any person becoming entitled to shares in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, or in any other way than by transfer, may be registered as a member upon such evidence being produced as may from time to time be required by the directors.

32. Any person becoming entitled to shares in any other way than by transfer may, instead of being registered himself, give notice specifying the name, address, and description of some person proposed to be registered as a member in respect of such shares, and if the directors shall not within fourteen days after receipt of such notice intimate to the person so entitled that they reject such nominee as a member the person so entitled may execute a transfer of such shares in his favor; but otherwise the person so entitled shall be registered as a member in respect thereof.

33. The directors may decline to register a transfer of shares without production of the certificate or certificates of such shares or of such evidence of the loss thereof and such indemnity as the directors may require, and on a transfer of shares
86 being registered the old certificates, if not lost or destroyed, shall be delivered up and a new certificate shall be issued.

Forfeiture of shares.

34. If any member fail to pay any call or instalment due on a share on or before the day appointed for the payment of the same the directors may, at any time thereafter during such time as the call or instalment remains unpaid, serve a notice on such member, requiring him to pay the same, together with any interest that may have accrued and all expenses that may have been incurred by the company by reason of such non-payment.

35. The notice shall name a day (not being less than fourteen days from the date of the notice) and a place or places on and at which such call or instalment and such interest and expenses as aforesaid are to be paid. The notice shall also state that in the event of non-payment on or before the time and at the place appointed the shares in respect of which the call was made or instalment is payable will be liable to be forfeited.

36. If the requisitions of any such notice as aforesaid are not complied with any shares in respect of which such notice has been

given may at any time thereafter before payment of all calls
87 . or instalments, interest, and expenses due in respect thereof be forfeited by a resolution of the directors to that effect.

37. Any share so forfeited shall be deemed to be the property of the company, and the directors may sell, reallot, or otherwise dispose of the same in such manner as they think fit.

38. The directors may at any time before any share so forfeited shall have been sold, reallotted, or otherwise disposed of annul the forfeiture thereof upon such conditions as they think fit.

39. Any members whose shares have been forfeited shall notwithstanding be liable to pay and shall forthwith pay to the company all calls, instalments, interest, and expenses owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of 5 per cent. per annum, and the directors may enforce the payment thereof if they think fit.

40. Upon any sale in purported exercise of the power given by clause 37 hereof the directors may cause the purchaser's name to be entered in the register in respect of the shares sold, and the purchaser shall not be bound to see to the regularity of the proceedings or to the application of the purchase-money, and after
88 his name has been entered in the register the validity of the sale shall not be impeached by any person, and the remedy of any person aggrieved by the sale shall be in damages only and against the company exclusively.

41. A declaration in writing by a director or office bearer of the company that a notice requiring payment of the call or instalment on a share was given and that default in payment of the call or instalment was made and that the forfeiture of the share was made by a resolution of the directors to that effect shall be sufficient evidence of the facts therein stated.

Reduction of capital, consolidation and subdivision of shares.

42. The company may from time to time reduce its capital and may consolidate or subdivide its shares and may cancel any shares that have not been taken or agreed to be taken by any person.

Paid-up capital may be returned upon the footing that the amount may be called up again in the same manner as if it had never been called up.

Borrowing powers.

43. The directors may, subject to the provisions of these presents, borrow or raise for the purposes of the company over the
89 company's estates and assets or part thereof, including capital uncalled or not paid up, such sum or sums of money as they may from time to time think proper, and may make and issue in the name of the company such bonds, debentures, or mortgages, terminable, redeemable, or perpetual conveyances, absolute or in trust, or other deeds of security, with power of sale and other usual clauses, and such receipts or other obligations, at such time, in such

form or manner, upon such terms, and for such amount as the directors may from time to time determine.

44. The total amount of money borrowed on terminable debenture, mortgage, or other security shall never exceed the amount of the company's unpaid capital for the time being, but every person lending to the company on such debenture, mortgage, or other security shall be entitled to assume without inquiry that no such excess has arisen.

45. Every debenture, mortgage, or other security issued by the company for securing money borrowed for its purposes shall be granted under the common seal of the company and signed by two directors and the managing director or secretary or by some person or persons duly authorized by the directors to that effect, and shall be so framed as to be capable of transfer, and every debenture, mortgage, or other security completed in due form of law and granted over any portion of the company's estates and assets shall enjoy the preference or priority given to it by law over the subjects conveyed or charged by it in security, and the respective holders of or other persons entitled to the debentures, mortgages, or other securities issued by the company shall proportionally, according to the amount of money secured thereby, where no special subjects of security are held, be entitled, equally with all persons who shall lend monies to the company, either at its registered office in Scotland or at its branch offices abroad, to be paid out of the estates and assets of the company the respective sums in their debentures, mortgages, or other securities aforesaid and the interest thereupon, without any preference one above another by reason of priority of date of any such debenture, mortgage, or other security; and where special subjects of security are conveyed or otherwise mortgaged in any debenture, mortgage, or other security the claim and ranking of the holders thereof or other persons entitled thereto against the company's general estate shall be only for the deficiency of the proceeds of the special subjects of security *in security* in meeting the amount of their respective debentures, mortgages, or other securities.

46. Money may be borrowed for the purposes of the company with a stipulation on the part of the lender, if approved by a special resolution of the company, that the security may be converted into preference or other shares or stock of the company.

47. In the event of any monies being borrowed for the purposes of the company on the terms of the securities for such monies being convertible into shares, the directors may create and issue such new shares, either preferential, ordinary, or deferred, as may be necessary for carrying such conversion into effect.

General meetings.

48. The first general meeting shall be held at such time, not being more than four months after the registration of the company, and at such place as the directors may determine.

49. Subsequent general meetings shall be held at such time and

place as may be prescribed by the company in general meeting, and, if no other time or place is prescribed, a general meeting shall be held in the month of April in every year, at such time and place as may be determined by the directors.

50. The above-mentioned general meetings shall be called ordinary meetings. All other meetings shall be called extraordinary.

92 51. The directors may whenever they think fit, and they shall upon a requisition made in writing by members holding in the aggregate not less than one-tenth of the issued capital, convene an extraordinary general meeting.

52. Any requisition made by members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

53. Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within fourteen days from the date of the service on them of the requisition, the requisitionists or any other members holding the required number of shares may themselves convene an extraordinary general meeting for the purpose specified in the requisition.

54. Seven days' notice at the least of every general meeting, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

93 55. Any member may, on giving not less than four days' previous notice in writing to the directors, submit any resolution to any general meeting beyond the matters contained in the notice convening such meeting.

56. Any requisition or notice given by members shall be served by leaving the same with the secretary or other officer of the company at its registered office, and the notice of a resolution to be submitted under the immediately preceding article shall contain a copy of the resolution.

Proceedings at general meetings.

57. The business of an ordinary meeting shall be to receive and consider the statement of income and expenditure and the balance-sheet, the reports of the directors and of the auditors, to elect directors and other officers of the company, to declare dividends, and to transact any other business which under these presents ought to be transacted at an ordinary meeting. All other business shall be deemed special and shall be transacted at an extraordinary meeting.

58. Seven members personally present shall be a quorum for a general meeting for the choice of a chairman, the declaration of a dividend, and the adjournment of a meeting. For all other purposes the quorum for a general meeting shall be members personally present, not being less than ten in number and holding or

representing by proxy not less than one-tenth part of the
94 issued capital of the company. No business shall be transacted at any general meeting unless the requisite quorum be present at the commencement of the business.

59. The chairman of the directors shall be entitled to take the chair at every general meeting, or if there shall be no chairman, or if at any meeting he shall not be present within ten minutes after the time appointed for holding such meeting, the members present shall choose one of their number to be chairman.

60. If within fifteen minutes from the time appointed for the meeting a quorum is not present, the meeting, if convened upon such requisition as aforesaid, shall be dissolved; but in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die*.

61. At any general meeting, unless a poll is demanded by at least five members or by a member or members holding or representing by proxy or entitled to vote in respect of at least 1,000 shares, a declaration by the chairman that a resolution has been carried or carried by a particular majority, or lost, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or pro-
95 portion of the votes recorded in favor of or against such resolution.

62. If a poll is demanded as aforesaid, it shall be taken in such manner and at such time and place as the chairman of the meeting directs, and either at once or after an interval or adjournment, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

63. The chairman of a general meeting may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

64. The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded.

65. No poll shall be demanded on the election of a chairman of a meeting or on any question of adjournment.

Votes of members.

65. Every member shall have one vote in respect of every ordinary share held by him.

67. In case of equality of votes in any division, the chairman, in addition to his vote or votes as a member, shall have a casting vote.

96 68. If any member is a lunatic or idiot he may vote by his legal curate, and if any member is a minor he may vote by his legal guardians or any one such guardian.

69. If two or more persons are jointly entitled to a share, the person whose name stands first on the register of members in respect

of such share, and no other, shall be entiled to vote in respect of the same. In the case of shares registered in the name of a copartnership firm, the company may vote by one of its partners, and in the case of an incorporated company or a corporation, such company or corporation may vote by its clerk or secretary.

70. No member shall be entitled to vote at any general meeting unless all calls due by him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company unless he has been registered as the holder of the share in respect of which he claims to vote for at least three months previous to the time of holding the meeting at which he proposes to vote.

71. Votes may be given either personally or by proxy. A
97 proxy shall be appointed under the hand of the appointer, or if such appointer is a corporation, under their common seal, and the instrument appointing him may be in the form or to the effect following:

"I, —— ——, of ——, in the county of ——, being a member of the Swan Land and Cattle Company, Limited, and entitled to — vote or — votes, hereby appoint —— ——, of ——, as my proxy to vote for me and in my behalf at the (ordinary or extraordinary, as the case may be) general meeting of the company, to be held on the — day of ——, and at any adjournment thereof.

"As witness my hand this — day of ——.

"—— ——.

"Signed by the said —— —— in the presence of—

"—— ——."

72. No person shall be appointed a proxy who is not a member, and the instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

73. If the instrument appointing a proxy be executed at any place within the United Kingdom the signature shall be attested by at least one witness, whose address and occupation shall be added thereto, and if executed at any place not within the United
98 Kingdom the signature shall be attested by a judge, notary public, consul, or magistrate, or by a local agent or other duly appointed officer of the company, and any such local agent or other officer of the company shall attest the same without payment.

74. Any instrument appointing a proxy given by a member may be recalled by such member on his transmitting a notice to that effect to the registered office of the company.

Directors.

75. That the number of the directors shall not be less than five nor more than nine.

76. The first directors of the company shall be—

Colin J. Mackenzie, Esq., of Portmore; Lord Douglas Gordon, M. P., London; William Anderson, Esq., C. A., Glasgow; Hugh Beckett, Esq., 3 Windsor terrace, Kelvinside, Glasgow; James Shepherd, Esq., manufacturer, Kirkcaldy; James Wilson, Esq., Edinburgh, formerly merchant, China; Alexander H. Swan, Esq., Cheyenne, Wyoming, U. S. A.

The said Alexander H. Swan shall not join the board until after the transfer of the property.

77. Each of the directors above named shall hold at least
99 500 shares in his own right in the company, and the company at their first annual general meeting shall determine what number of shares must thereafter be held to qualify for the office of director. The office of director shall be vacated—

If he cease to hold in his own right, prior to the first annual general meeting, at least 500 shares, or thereafter at least the number of shares which shall then be prescribed as the qualification;

If he becomes bankrupt or insolvent, suspends payment, grants a trust deed for behoof of or compounds with his creditors;

If he becomes lunatic or of unsound mind;

If he shall absent himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors.

78. At the first annual general meeting of the company all the directors shall retire from office, but shall be eligible for re-election; and at such meeting the members shall, subject to clause 75 hereof, determine the number of which the board of directors shall consist, and shall elect such number of qualified members to be directors.

79. The order of seniority of directors shall be determined by themselves, and at the annual general meeting in every year
100 after the first general meeting of the company the two senior directors for the time being shall retire from office, but shall be eligible for re-election. Retiring directors shall continue to act until their successors are elected. At the general meeting at which any director retires from office by seniority the company shall fill up the vacancy.

80. The company in general meeting may remove any director before the expiration of his period of office and may elect another person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

81. A director may at any time give notice in writing to the secretary of his wish or intention to resign, and on the acceptance of his resignation by the board, but not before, his office shall be vacant.

82. Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

83. The remaining directors may continue to act as a board, notwithstanding any vacancy in their number by death, resignation, or otherwise.

101 84. The company in general meeting may from time to time increase or reduce the number of directors, and may alter their qualification, and may also determine in what rotation such increased or reduced number is to go out of office.

85. No director shall vacate his office by reason of his being a member of any company or body which has entered or may enter into contracts with or do work for the company, but he shall not be entitled to vote with reference to such contract or work.

Proceedings of directors.

86. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit. Three shall be a quorum.

87. A director may at any time convene a meeting of the directors.

88. Questions arising at any meeting of directors shall be decided by a majority of votes, and in case of an equality of votes the chairman shall have a second or casting vote.

89. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no chairman is elected or if at any meeting the chairman is not
102 present at the time appointed for holding the same, the directors present shall choose one of their number to be chairman of such meeting.

90. The directors may appoint any person, whether a director or not, and either having or not having the share qualification of a director, to be managing director or manager of the company, under such terms and conditions as to his powers and duties, the duration of his office, his remuneration, and otherwise as they may think proper.

91. The directors may delegate any of their powers to committees, consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of its powers so delegated, conform to any regulations that may from time to time be imposed on it by the directors.

92. The meetings and proceedings of any such committee, consisting of two or more members, shall be governed by the provisions herein contained for regulating the meetings and proceedings of the directors so far as the same are applicable thereto and are not superseded by any regulations made by the directors under the last preceding clause.

93. All acts done at any meeting of the directors or of a committee of directors or by any person acting as a director shall, not-
103 withstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if any such person had been duly appointed and was qualified to be a director.

Minutes.

94. The directors shall cause minutes to be duly entered in books provided for the purpose—

(*a.*) Of all appointments of officers.

(*b.*) Of the names of the directors present at each meeting of the directors and of any committee of directors.

(*c.*) Of all orders made by the directors and committees of directors.

(*d.*) Of all resolutions and proceedings of general meetings and of meetings of the directors and committees.

And any such minutes, if signed by any person purporting to be the chairman of any meeting of the company or of the directors or committee of directors, as the case may be, shall be receivable as *prima facie* evidence of the matters stated in such minutes.

Remuneration of directors.

95. The remuneration of the directors shall be fixed at the first annual general meeting of the company, and the company
104 shall have power at any subsequent general meeting to increase or diminish the said remuneration, and the sum so fixed shall be divided amongst the directors as they shall agree and determine.

96. The directors shall be entitled to make special remuneration to any directors who may do special business for the company or who may be sent abroad or who may reside abroad on the business of the company and to pay the traveling expenses of such directors and also the traveling expenses of directors living at a distance from Edinburgh attending the directors' meetings and meetings of the company.

Powers of directors.

97. The management of the business of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by the statutes required to be directed by the company in general meeting, but subject, nevertheless, to any regulations from time to time made by the company in general meeting, provided that no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

105 98. Without prejudice to the general powers conferred by the immediately preceding clause and to the other powers conferred by these presents, it is hereby expressly declared that the directors shall have the following powers:

(1.) They shall have power to adopt under the seal of the company the agreements referred to in clause 6 hereof, and may take such steps as they think fit to carry said agreements into effect.

(2.) They shall pay the costs, charges, and expenses preliminary and incidental to the promotion, formation, and establishment of

the company, including the expenses *of* incident to and following upon the agreements mentioned in the immediately preceding subsection and the costs of preparing and registering these presents, and they shall also, within one month after the allotment of the shares, pay a commission of 1 per cent. on the company's capital of £600,000 to James Wilson, Esq., of 23 Mayfield Gardens, Edinburgh, as remuneration for his trouble and responsibility in connection with the acquisition of the property referred to in the agreements and the formation of the company.

(3.) They may appoint from their own number or otherwise and at their discretion remove or suspend trustees, managers, secretaries, and other officers, clerks, agents, and servants for perma-
106 nent, temporary, or special services, as they may from time to time think fit, and may determine their duties and fix their remuneration by way of salary, wages, fees, commission, or participation in profits or by all or any one or more of these methods, and may require security in such instances and to such amount as they think fit.

(4.) They may appoint bankers for the company in Great Britain and the United States of America.

(5.) They may from time to time provide for the management of the affairs of the company abroad in such manner as they think fit and, in particular, may appoint any persons to be the attorneys or agents of the company or to act as boards of advice for the company with such powers and upon such terms as may be thought fit.

(6.) They may from time to time invest any monies belonging to the company and not immediately required for the purposes of the company in or lend the same upon the security of such stocks or shares (but so as not to involve the company in liability for future calls), bonds, debentures, or other securities in the United Kingdom or the United States of America as they may think fit, and may also lodge money temporarily in bank in the United Kingdom or United States of America.

107 (7.) They may from time to time make, vary, and repeal by-laws for the regulation of the business of the company.

(8.) They may compromise, refer to arbitration, or otherwise deal with on such terms as they may think fit all claims by or against the company or questions in which the company is interested.

(9.) They may enter into all such negotiations and contracts and vary and rescind all such contracts and execute and do all such acts, deeds, and things in the name and on behalf of the company as they may consider expedient in relation to the business of the company.

(10.) They may before recommending any dividend set aside, out of the profits of the company or out of any premiums to be received on the issue of shares, such sum as they think proper for the formation and maintenance of a reserve fund to meet contingencies or for equalizing dividends, or as a sinking fund to redeem or pay off the company's obligations, or for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and they may invest the several sums so set aside upon such investments as they may think fit, other than the shares

of the company; the interest to be derived from said reserve fund to be carried to revenue account and be divisible among the members.

108 (11.) They may cause the company to be incorporated or registered in the United States of America.

99. All deeds by the company, in addition to being sealed, and all bills of exchange, drafts, promissory notes, and cheques, shall be signed by at least one of the directors and the managing director or secretary, and all such documents executed as herein prescribed shall be valid and sufficient.

Accounts.

100. The directors shall cause to be kept at the registered office of the company, and at such other place or places as the directors may think fit, true accounts of the sums of money received and expended by the company, and the matters in respect of which such receipt and expenditure takes place, and of the assets, credits, and liabilities of the company.

101. The financial year of the company shall run from 1st January to 31st December. The books of the company shall be brought to a balance once a year, at 31st December (to be called the annual balance) in each year, and the directors shall within three months after each annual balance lay before a general meeting of the company a profit and loss account for the preceding year, and a

109 balance-sheet doc*que*ted by them which shall contain a summary of the property and liabilities of the company made up for the period embraced by the balance. The first balance shall be at 31st December, 1883.

102. Every such statement and balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company and as to the amount which they recommend to be paid out of the profits by way of dividend or bonus, or both, to the numbers and the amount (if any) which they propose to carry to the reserve fund or sinking fund, according to the provisions in that behalf hereinbefore contained.

103. A printed copy of such balance-sheet and report shall seven days previously to the meeting be delivered at or sent by post to the registered address of every member.

104. Every account of the directors, where audited and approved of by a general meeting, shall be conclusive, except as regards any error discovered therein before the next balance-sheet is made up, and the correction of such error (if any be discovered) shall be given effect to in said balance-sheet.

Audit.

105. Once at least in every year the accounts of the company shall be examined and the correctness of the balance-sheet ascertained by an auditor or auditors, who for the first year shall

110 be appointed by the directors and thereafter shall be elected by the company at the annual general meeting.

106. The auditor need not be a member of the company. No person shall be eligible as an auditor who is at the time of such election interested otherwise than as a member in any transaction of the company, and no director or other officer of the company or any partner of such director or officer shall be eligible during his continuance in office.

107. The remuneration of the first auditor shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.

108. Any auditor shall be eligible for re-election on quitting office.

109. If any casual vacancy occurs in the office of auditor the directors shall fill up the vacancy till next general meeting.

110. The auditor shall be supplied with a copy of the balance-sheet and profit and loss account, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

111. The auditor shall have a list delivered to him of all books and accounts kept by the company, and he shall at all reasonable times have access to such books and accounts.

112. The auditor shall make a report to the members upon
111 the balance-sheet and accounts, and in every such report he shall state whether in his opinion the balance-sheet is a full and fair balance-sheet containing the particulars required by those regulations and properly drawn up so as to exhibit a true and correct view of the company's affairs, and such report shall be read, together with the report of the directors, at the annual general meeting.

Dividends.

113. Subject to the rights of members entitled to shares issued upon special conditions, the profits of the company shall belong to the members in proportion to the amount paid up on the shares held by them respectively: Provided, nevertheless, that where money is paid up in advance of calls under clause 25 hereof, upon the footing that the same shall carry interest such money shall not while carrying interest confer a right to participate in profits.

114. All dividends or bonuses on shares shall be declared by a general meeting of the company, and no dividend shall exceed the sum recommended to the meeting by the directors, who may at any time in any or every year pay such sums half-yearly or otherwise on account of dividend on the paid-up capital of the company as they may think fit.

112 115. No dividend shall be payable except out of the profits arising from the business of the company, but to provide for the equalization of dividends advances may be made from time to time out of the reserve fund, if any, and applied in payment of dividends.

116. The directors shall deduct from the dividend or bonus payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

117. Notice of any dividend or bonus that may have been de-

clared shall be given to each member or sent by post or otherwise to his registered address.

118. No dividend or bonus shall bear interest as against the company.

Company's seal.

119. A seal shall be provided by the directors with such device thereon as they shall prescribe and with the corporate name of the company engraved thereon. The device on the seal may be altered by the directors from time to time.

120. The seal shall be under the charge of the directors, who from time to time may prescribe such rules as they think fit for the safe custody thereof, but, until they otherwise direct, the seal shall be kept at the registered office of the company.

113 121. The use and affixing of the seal may be directed by the directors or any general meeting.

122. The seal shall never be affixed to any share certificate or debenture or other document or deed without the express authority of a meeting of the directors or committee of the directors, and an entry thereof being made in the minute book.

123. The company may exercise the powers given by "the companies seals act, 1864."

Notices.

124. Notices required to be served by the company upon the members shall, in the discretion of the directors, be given either by advertisement or by notice sent by post or otherwise to each shareholder at his registered address or place appointed for service of notice within the United Kingdom, or, if the directors think fit, intimation shall be given both by advertisement and notice. In the case of shareholders resident out of Scotland notices shall be sent by post, but if they have left no address for service within the United Kingdom a notice advertised once in a daily newspaper published in Edinburgh shall be sufficient, and the company shall not be bound to serve notices in any other manner.

114 125. All notices directed to be given to the members shall, with respect to any share to which two or more persons are jointly entitled, if given to whichever of the said persons is named first in the register of numbers, be held to be sufficient notice to all the proprietors of such share.

126. Any notice requiring authentication by the company may be signed by any director, manager, secretary, or other officer of the company in that behalf authorized by the directors, and need not be under the common seal of the company, and the signature may be written or printed.

127. Any notice to be given by advertisement shall be inserted in such newspapers as the directors may determine.

128. Notices by letter shall be posted in such time as to admit of the letter being delivered in the due course of delivery in the United Kingdom within the period (if any) prescribed for the giving of such notice.

Dissolution of the company.

129. The dissolution of the company may be determined on by the company for any purpose whatever, and whether the object be the absolute and final extinguishment of the company or the reconstitution or modification of the company or the amalgamation of the company with any other company or any other object.

115 130. Whenever it shall appear to the directors that one-half of the paid-up capital of the company is lost, they shall summon an extraordinary general meeting to consider whether or not the company shall be dissolved and wound up.

131. The company, by a special resolution passed in terms of the 51st section of "the companies act, 1862," may determine on the dissolution of the company.

132. At the extraordinary general meeting held to confirm such special resolution the company shall prescribe the time at which the dissolution, if resolved on, shall take place and the mode in which it shall be conducted.

Indemnity of directors and officers.

133. Every director, auditor, manager, secretary, and other officer of the company shall be saved harmless and indemnified by the company from and against all actions, suits, losses, costs, charges, damages, and expenses whatsoever which he shall incur or sustain by or by reason of any act done, concurred in, or omitted by him in the execution of his duty or supposed duty as such director, auditor, manager, secretary, or officer, unless the same shall be incurred or sustained by or through his own wilful act or default; and no director, auditor, manager, secretary, or other officer shall be

116 answerable or responsible for any act, neglect, or default done or committed without his authority or concurrence by any other director, auditor, manager, secretary, or officer, but each of them shall be in like manner saved harmless and indemnified by the company from and against the consequences of every such last-mentioned act, neglect, or default.

Names, addresses, and descriptions of subscribers.

Colin J. Mackenzie, Portmore, Eddleston, N. B., landed proprietor.

Jas. Shepherd, Rossend Castle, Burntisland, manufacturer.

Douglas Gordon, 22 Half Moon street, London, gentleman.

Jas. Wilson, 23 Mayfield Gardens, Edinburg, no occupation.

H. Beckett, 3 Windsor Terrace, West Glasgow, merchant.

Wm. Anderson, C. A., Glasgow.

Wm. Stuart Fraser, of 16 Castle street, Edinburg, writer to the signet.

Dated the 30th day of March, 1883.

(Witness to the above signatures:)

ROBERT URQUHART,
Law Clerk, 16 Castle Street, Edinburg, Witness.

Copy Certificate of Incorporation.

No. $\frac{1188}{1225}$. Certificate of incorporation of "The Swan Land and Cattle Company, Limited."

117 I hereby certify that "The Swan Land and Cattle Company, Limited," is this day incorporated under the companies acts, 1862 to 1880, and that this company is limited.

Given under my hand, at Edinburgh, this thirtieth day of March, one thousand eight hundred and eighty-three.

JOHN J. REID,
Q. & L. T. R. and Registrar of Joint Stock Companies.

(Endorsed:) Filed July 14, 1887. Wm. H. Bradley, clerk.

118 On the same day, to wit, on the fourteenth day of July, 1887, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal thereto attached, *are* in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss:*

The United States of America to Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, Charles A. Wilson, Alexander H. Swan, and Thomas Swan, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of September next, to answer the bill of complaint of The Swan Land and Cattle Company, Limited, a corporation, &c., this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made upon pain of judgment being pronounced against you by default.

119 To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the 112th year.

[SEAL.]

WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ in the following manner, to wit: Upon Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and also as administrator upon the estate of Louis Snydacker, deceased; Henry L. Frank, Ellery E. Spinney, Alfred M. Snydacker, Eugene Arnstein, and Samuel Marks on the 15th day of July, A. D. 1887; also upon Patrick Long on the 22nd day of July, A. D. 1887, by personally delivering
120 to each of them a true copy of the same on the aforesaid days.

I also served the same upon the following-named defendants, not being able to find them to serve personally, by leaving a true copy of the same for each of them at their usual places of abode, with an adult person and a member of their respective families, to wit: Upon Louis E. Frank on the 20th day of July, A. D. 1887, with Nellie Feely; upon Bertha Snydacker on the 20th day of July, A. D. 1887, with Mary Oswald; upon Isaac Loewenberg on the 20th day of July, with Emma Lowenberg.

F. H. MARSH,
U. S. Marshal.
GEO. N. JONES, *Dep.*

I have served the within writ within my district in the following manner, to wit: Upon Charles A. Wilson therein named; on the 27th day of July, A. D. 1887, by personally delivering to him a true copy of the same on the aforesaid day. I also served the same upon the following-named defendant, not having been able to find him to serve personally, by leaving a true copy for him at his usual place of abode, with an adult person and a member of his family, to wit, upon Emanuel Mandel on the 4th day of September, A. D. 1887, with Katie Wiss. I did not serve Charles E. Anthony, Alexander H. Swan, and Thomas Swan, the other defendants, having been unable to find either or that they had any residence within my district.

F. H. MARSH,
U. S. Marshal,
By W. H. DUTCHER, *Deputy.*

(Endorsed:) Filed Sept. 5, A. D. 1887. Wm. H. Bradley, clerk.

121 Afterward, to wit, on the fifth day of September, 1887, came Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum,

and others, by their solicitors, and filed in said clerk's office their special appearance in said entitled cause; which said special appearance is in the words and figures following, to wit:

Special Appearance.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

THE SWAN LAND AND CATTLE COMPANY, LIMITED,
vs.
JOSEPH FRANK, MORRIS ROSENBAUM, JOSEPH ROSENBAUM, Godfrey Snydacker, in His Own Right and as Administrator upon the Estate of Louis Snydacker, Deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, Charles A. Wilson, Alexander H. Swan, Thomas Swan. } In Equity.

122 The clerk of this court will please enter our special appearance as solicitors for the following defendants in the above-entitled cause, to wit, Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, and Charles A. Wilson.

Said special appearance being entered for the express purpose of denying the jurisdiction of this honorable court to sustain said bill, as also its jurisdiction over these defendants or any of them, and for no other purpose whatsoever.

KRAUS, MAYER & STEIN,
Sol'rs for Def'ts Mentioned in said Special Appearance.

LEVY MAYER, *Of Counsel.*

Chicago, Sep. 5, '87.

(Endorsed:) Filed Sept. 5, 1887. Wm. H. Bradley, clerk.

123 Afterward, to wit, on the eighth day of November, 1887, there was filed in said clerk's office a stipulation and demurrer in said entitled cause; which said stipulation and demurrer are in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

THE SWAN LAND AND CATTLE COMPANY (LIMITED)
vs.
JOSEPH FRANK *et al.* } In Chancery.

It is hereby stipulated that the defendants, for whom an appearance has heretofore been entered in said cause, including Anthony, shall have thirty days additional time from the third of October, 1887, in which to plead, answer, or demur.

SWIFT & CAMPBELL,
Sol'rs for Compl't.

Further time is hereby given to above parties defendants up to and including November 8th, 1887, in which to plead, answer, or demur.

SWIFT & CAMPBELL,
Sol'rs for Compl't.

Oct. 31, '87.

124 *Demurrer.*

In the United States Circuit Court, Northern District of Illinois.

The demurrer of Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, and Charles A. Wilson, certain defendants, to the bill of complaint of The Swan Land and Cattle Company, Limited, complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for several causes of demurrer show:

First. That said complainant hath not in and by its said bill made or stated such a case as this court can take jurisdiction of or as doth or ought to entitle it to any discovery or relief as in said bill is sought and prayed for from or against these defendants.

Second. That in and by said bill it appears that the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company are and each of
125 them is a necessary party to the said bill, inasmuch as it therein is alleged that the said companies and each and all

of them made and entered into the contract of sale therein mentioned and made the several representations therein complained of as false and fraudulent, and that in and by the said bill it appears that the liability for damages arising from said false and fraudulent representations is primarily that of the said companies and is only secondarily that of these defendants, and the object of the said bill is to compel the payment of the debt of the said companies, but the said plaintiff hath not made the said companies parties to the said bill.

Third. That it appears in and by the said bill that the sale therein mentioned was made by said three companies jointly, but does not say that these defendants were stockholders in all of them or in any particular one of them, nor that, as the stockholders of any one of them, they or any of them received any part of the said purchase price, or that if the company of which any individual one of these defendants was a stockholder received any part of the said purchase price of the property in said bill mentioned, yet the debts of the said company were not sufficient to exhaust all of its respective share of the purchase price of said property; whereby it is made to appear
126 that some of these defendants are in no way interested in the several and distinct matters and causes of complaint in the said bill alleged, and by joining several distinct matters together which do not depend upon each other the proceedings in the progress of the said suit will be intricate and prolix and these defendants and each of them put to unnecessary charges and expenses in matters which in no way relate to or concern them.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, these defendants demur to the said bill and to all the matters and things therein contained and demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein complained of, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

LEVY MAYER &
KRAUS, MAYER & STEIN,
Sol'rs for said Def'ts.

LEVI MAYER,
PHILIP STEIN,
Of Counsel.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Godfrey Snydacker, being duly sworn, says that he has heard read the foregoing demurrer to the bill of complaint of the Swan
127 Land and Cattle Company, Limited, in this suit; that this deponent is one of the demurrants in said demurrer, and that the same is not interposed for the purpose of delaying said suit or any procedings therein.

GODFREY SNYDACKER.

Subscribed and sworn to before me this 8th day of November, A. D. 1887.

[SEAL.] ADOLPH ASCHER,
Notary Public.

I, Levy Mayer, a counselor of said court, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law and proper to be filed in the above cause.

Dated Chicago, November 8th, 1887.

LEVY MAYER,
Counselor-at-Law.

(Endorsed:) Filed Nov. 8, 1887. Wm. H. Bradley, clerk.

128 Afterward, to wit, on the eighth day of April, 1889, came Joseph Frank, Morris Rosenbaum, and others, by their solicitor, and filed in said clerk's office their appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

Appearance.

In the Circuit Court of the United States, Northern District of Illinois.

SWAN LAND & CATTLE CO.
vs.
JOSEPH FRANK *et al.*

To the clerk:

Please enter my appearance for Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right & as administrator of Louis Snydacker, dec'd; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, & Charles A. Wilson, defendants in the above-entitled suit.

J. M. WOOLWORTH,
Of Counsel for said Defendants.

Dated Chicago, April 1, 1889.

(Endorsed:) Filed Apr. 8, 1889. Wm. H. Bradley, clerk.

129 Afterward, to wit, on the seventeenth day of May, in the adjourned May term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE SWAN LAND AND CATTLE COMPANY, LIMITED,
vs.
JOSEPH FRANK *et al.*
} In Chancery.

Now come the parties, by their solicitors, and this cause, being set for hearing this day, now comes on to be heard upon pleadings and proofs, and, after hearing the arguments of counsel, the court takes the same under advisement.

130 Afterward, to wit, on the twenty-second day of July, 1889, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause; which said opinion is in the words and figures following, to wit:

Circuit Court of the United States, Northern District of Illinois.

SWAN LAND AND CATTLE COMPANY, LIMITED,
vs.
JOSEPH FRANK *et al.*

JULY 22, 1889.

BLODGETT, *J.*:

This bill is now before the court upon a demurrer filed in behalf of all the defendants who have been served with process.

The bill seeks relief against the defendants as stockholders in certain corporations organized under the laws of the Territory of Wyoming.

The bill avers that in November, 1882, there was existing and doing business in the Territory of Wyoming three corporations, organized under the laws of said Territory, engaged in the business of breeding and dealing in cattle, known respectively as "the Swan & Frank Live Stock Company," "the National Cattle Company," and "the Swan, Frank & Anthony Cattle Company;" that on the 27th of November, 1882, said three companies joined in making a written contract with one James Wilson, of Edinburgh, Scotland, by which said companies agreed to sell to a limited company to be thereafter incorporated under the laws of Great Britain and
131 Ireland by said Wilson and his associates as promoters, for the sum of $2,553,825, all and singular the lands and tenements, possessory rights to lands and tenements, water rights, improvements upon lands, houses, barns, stables, corrals, and other improvements and grazing privileges; also all live stock, consisting of neat cattle, horses, and mules belonging to said three Wyoming corporations or any or either of them; also all live stock, brands, tools, implements, wagons, harness, ranch, camp, and round-up outfits, and branding irons belonging to said Wyoming corporations or any or either of them, which said lands and tenements, possessory rights, goods, and chattels were particularly enumerated and described in certain inventories annexed to said written agreement and made a part thereof.

That said contract contained, among other provisions, the following covenant: "And it is further agreed on the part of the said first parties as to all live stock mentioned and described in said inventories that said first parties shall and do hereby agree and guarantee to and with said second party that the herd books of said first parties showing the acquisitions, increase, disposition of, and number of cattle now on hand of said first parties respectively have been truly and correctly kept."

That after making said contract Wilson proceeded to Scotland, and there succeeded in organizing the complainant company, a limited liability company, as contemplated in said contract, under the laws of Great Britain and Ireland, and secured the subscription for and payment into the complainant company of sufficient capital stock to consummate the said contract, and that some time
132 in April, 1883, the full purchase price called for by the Wilson contract, less certain agreed deductions for expenses, &c., was paid to the three vendor companies, and bills of sale and deeds for the property of the vendors were delivered to the complainant and complainant thereupon took possession of the property so transferred to it by the vendors.

It is also alleged in the bill that the vendor companies represented to the complainant and to the promoters of the complainant company and to the shareholders of the complainant company that it was impossible to count the cattle which the vendor companies agreed to sell to complainant and that complainant would be obliged to take possession of the same wherever they might be ranging without any count whatever and without any other or further act on the part of the vendors than the delivery of the bills of sale and deeds; that complainant relying upon the representations made by the vendors in the inventories attached to and made a part of said agreement of sale, and upon the representations of the vendors that the death losses in their herds were made good by the number of calves which escaped branding at the regular branding season, and their further representations that they undoubtedly had the full number of eighty-nine thousand one hundred and sixty-seven (89,167) head of cattle in their said herds, and relying upon the joint guaranty of the vendors that their herd books truly and correctly showed the number of cattle then on hand, and upon the guaranty that the calf brands of the year 1883 would amount to seventeen thousand eight hundred sixty-eight (17,868) calves, and fully believing, as stated by the vendors, that it was impossible to count said cattle, complainant consented to receive delivery
133 of said cattle and did receive the same without any count, and took the same wherever they were ranging without any other act on the part of the vendors than the delivery of said papers by the vendors.

The bill further states that one Alexander H. Swan was the active agent of the vendor companies in the negotiations and consummation of said sale to the complainant; that Swan was connected with all the vendor companies as a stockholder and was an officer in all of them; that he had had large experience in the management of

such properties, and that by reason of said Swan's knowledge of said properties and the business of the vendor companies the complainant made an agreement with him to continue in charge of said herds as manager for complainant at a large salary, and that Swan at once, after said purchase was consummated by complainant, took charge of said herds and of all said ranch property as manager for complainant and continued to be such manager until a very recent date before the filing of this bill.

It is further averred that Swan, as such manager, reported to complainant that 17,932 calves were actually branded at the branding season of the year 1883, and further says that said report was false and intentionally made so in order to deceive and defraud the complainant.

The bill further says that complainant has now learned "that the representations made by the vendors that they had eighty-nine thousand one hundred sixty-seven (89,167) head of cattle to sell to complainant was grossly untrue, and the representations made
134 by said vendors that the number of calves in their herd which escaped branding at the regular branding season was sufficient to offset death losses in said herds was also grossly untrue," and avers that the fact that said representations were untrue was known to the vendors, and that the vendors were unwilling to have said cattle counted at the time such purchase was consummated because they well knew that such count would show that the- did not have the number of cattle that they purported to have and had agreed to sell.

And the bill further avers that there were at least thirty thousand head of cattle less in the herd sold to complainant then the vendors represented themselves to have, and that complainant has suffered damage in consequence of such deficiency and in consequence of the misrepresentations of the vendors to the amount of at least $800,000.

It is also further charged in the bill that the vendors had no other assets, or substantially none, except the property sold by them to complainant, and that after the sale of their said properties to the complainant and the receipt by them of the purchase price the three vendor companies paid whatever liabilities they had outstanding, except their liability to complainant herein set forth, and distributed the money and stock obtained from complainant as the proceeds of said sale and all their other assets among their respective shareholders, and the same were received by said shareholders, and since that time said three corporations have not, nor has either of them, made any use whatever of their franchises, but they
135 have abandoned the same, and neither of said corporations has any officer or agent upon whom process can be served, and they have not, nor has either of them, any assets of any kind out of which any judgment at common law against them or either of them could be satisfied.

That the assets of said corporations were in the hands of the vendor corporations a trust fund to satisfy the claim of complainant, as set forth in its bill, before the shareholders of said vendor corporations were entitled to receive any portion of the same, and

said shareholders in taking and receiving said assets took and now hold the same as trustees in place of the corporations and subject to lien of complainant's aforesaid claim for damages.

That all the defendants in this bill were shareholders in some one or more of the vendor corporations and received their proper shares of said assets when said assets were distributed as aforesaid.

The bill states that complainant has made defendants thereto all the shareholders of the vendor corporations who reside within this district.

The prayer of the bill is that each and every of the defendants shall by a decree of the court be required to account for and pay over, as the court may direct, to complainant in satisfaction of complainant's damages so much of the assets of said respective corporations as may be necessary to satisfy complainant's demand.

Neither of the original vendor corporations are made parties to this bill, nor is it claimed that all the stockholders in said
136 corporations are made parties, but only such stockholders as are within this district.

The bill is demurred to mainly on two grounds:

1. That the vendor corporations are necessary and indispensible parties to this suit.

2. That no judgment at law has been obtained against said vendor corporations for the amount of damages which complainant alleges it has sustained by reason of a breach of the covenants or the misrepresentations set out in this bill.

It is true that the complainant seeks by the averment that said vendor corporations, having abandoned their corporate franchises, have no officer or agent on whom process can be served to excuse itself for not making the corporations parties defendant, and perhaps it may be said that they intend also to excuse themselves thereby for not having obtained judgments at law against the vendor corporations.

But the averment that the vendor corporations have distributed their assets among their stockholders and ceased to make any use of their franchises is not equivalent to an averment of the dissolution of the corporation.

The law is well settled that a corporation is not dissolved by the non-use of its franchises or by the want of assets.

Bank of Bethel *vs.* Pahquoque Bank, 14 Wall., 383.

National Bank *vs.* Insurance Company, 104 U. S., 54.

137 The rule was undoubtedly correctly laid down in Boston Glass Manufactory *vs.* Langdon, 24 Pick., 49, where it is said:

"The possession of property is not essential to the existence of a corporation. Its insolvency cannot therefore extinguish its legal existence. * * * The omission to choose directors clearly does not show the dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them would not be fatal to its existence. It has a

potentiality which might by proper authority be called into action without affecting the identity of the corporate body."

By the laws of Wyoming, under which these vendor corporations were organized, "failure to elect trustees on the day designated by the by-laws of a company does not dissolve the corporation, but an election may be held on any other day, and all acts of trustees are binding until their successors are elected." Rev. Stats. of Wyoming, sec. 560. And service of process could be made on such corporations by the laws of Wyoming by serving the same upon any of the trustees or officers or by leaving a copy at the usual place of business of such corporation; so that there is nothing in the bill showing any valid reason in law why the corporations cannot be made parties to the controversy set out in this bill if the suit is brought within the proper jurisdiction.

That these vendor corporations are not only necessary but indispensible parties to this controversy it seems to me can hardly admit of a doubt upon the statements made by the bill. It
138 will be noticed that all the claim which the complainant seeks to enforce against the defendants as stockholders of these corporations are claims sounding in damages which have accrued by reason of the alleged breach on the part of the vendor corporations of their covenants in regard to the number of cattle upon their respective ranches and their misrepresentations in regard to the present and prospective value and profits of their property as set forth at length in the bill, many of which I have not quoted.

As the case stated in the bill is one sounding wholly in damages, it is one peculiarly appropriate to the jurisdiction of a court of law. It is a case for damages primarily against the vendor corporations, and the defendants in this case only sought to be made secondarily liable by reason of the fact that they are charged with having possession of certain assets of the vendor corporations out of which it is insisted complainant's damages should be satisfied, but it seems to me that the first step is to establish a claim against these vendor corporations. The complainants are in effect by this bill seeking to compel these defendant stockholders to try a case in this court against corporations who are not parties to the suit. The first and fundamental question in the complainant's case is, Has there been a breach of the covenants of these vendor corporations, and what amount in damages has the complainant sustained by reason of such breach? It would be anomalous and unjust, it seems to me, to try this question in a suit to which the corporations were not parties and where they could not be heard.

139 The case made by the bill is one peculiarly, if not exclusively, appropriate for trial by a court of law. The extent of the shortage in the cattle sold complainant and the value of those cattle is a matter which, it seems to me, these defendants have the right to demand should be enquired of and adjudicated upon by a court of law. Indeed, it may well be doubted whether this court, sitting as a court of equity, should take jurisdiction of the controversy as stated in the bill.

In Story's Equity Jurisprudence, vol. 1, sec. 72, it is said: If,

therefore, the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be strong reasons for declining the exercise of the jurisdiction, since it is the appropriate function of a court of law to superintend such trials; and in many other cases where the question arises purely on matters of fact fit to be tried by a jury and the relief is dependant upon that question there is equal reason that the jurisdiction for relief should be altogether declined."

I am, therefore, of opinion that the demurrer to this bill is well taken upon the ground that the complainant should first establish by a suit at law not only the fact that it has a claim for damages against these defendant corporations, but the amount of such damages.

And *if* even if I am in error upon this point and if a court of equity can, with the proper parties before it, administer the relief which the complainant seeks in this bill without the damages first having been ascertained and determined by a suit at law,
140 still there can be no doubt, I think, in the light of the authorities that the vendor corporations are necessary and indispensible parties to such bill.

Kendig *vs.* Dean, 97 U. S., 423.
Wood *vs.* Dummer, 3 Mason, 308.
Lyman *vs.* Bonney, 101 Mass., 562.
Patterson *vs.* V. Lyndem, 112 Ills., 196.
First National Bank *vs.* Smith, 6 Fed. R., 215.

As I have already said, the complainant by the bill as now framed seeks to compel the defendants who are not the vendor corporations to try in effect a suit against the vendor corporations where the claim sounds wholly in damages. These defendants are not supposed to have within their possession or control either the facts upon which the corporations themselves might base a defense or upon which the damages could be measured and determined. The books, papers, vouchers, original contracts, everything which would be material to the settlement of the rights of the complainant against the vendor corporations, must be supposed to be in the hands of the vendor corporations or some of their officers, and not in the hands of either of these defendants by reason of the mere fact of their being stockholders.

These vendor corporations, being Wyoming corporations, cannot be brought into this court, and hence the bill is not only fatally defective as it now stands, but cannot be amended in that respect.

The demurrer is therefore sustained and the bill dismissed.

Endorsed: Filed July 22, 1889. Wm. H. Bradley, clerk.

141 On the same day, to wit, on the twenty-second day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

THE SWAN LAND AND CATTLE COMPANY, LIMITED,
vs.
JOSEPH FRANK *et al.*
} In Chancery.

The court, having considered the demurrer to the bill, sustains the same; and thereupon it is ordered that said bill be dismissed for want of equity at complainant's costs, and that execution issue therefor.

And now comes the complainant, by its solicitor, and prays an appeal to the Supreme Court of the United States from this order of dismissal, which is allowed upon complainant's filing an appeal bond in the penal sum of one thousand dollars within sixty days, with surety to be approved by the court.

142 Afterward, to wit, on the nineteenth day of September, 1889, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, The Swan Land and Cattle Company, Limited, a corporation organized under the laws of the Kingdom of Great Britain & Ireland, and John Clay, Jr., and David Campbell, of Chicago, Cook county, Illinois, are held and firmly bound unto Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Snydacker, Isaac. Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, and Charles A. Wilson, in the full and just sum of one thousand dollars, to be paid to the said obligees, their certain attorney, executor, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of September, A. D. 1889.

143 Whereas, on July 22, 1889, in the circuit court of the United States for the northern district of Illinois, northern division, in a cause depending in said court between said The Swan Land and Cattle Company, Limited, complainant, and the above-named obligees and Alexander H. Swan and Thomas Swan, defendants, a decree was, on the demurrer of said obligees, entered dismissing the bill of complaint of said complainant and a decree was entered against said complainant for the costs of said cause, and said complainant having prayed an appeal to the Supreme Court of the

United — to reverse the decree in said cause, and the said appeal having been allowed:

Now, the condition of the above obligation is such that if the said The Swan Land and Cattle Company, Limited, shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SWAN LAND AND CATTLE COMPANY, LIMITED, [SEAL.]
By JOHN CLAY, JR., [SEAL.]
Its Ag't & Att'y-in-Fact. [SEAL.]
JOHN CLAY, JR. [SEAL.]
DAVID CAMPBELL. [SEAL.]

UNITED STATES OF AMERICA,
Northern District of Illinois, Cook County, } *ss:*

John Clay, Jr., and David Campbell, the trustees within
144 named, being duly sworn, say that they are each worth the sum of at least five thousand dollars over & above all their just debts in property in said northern district of Illinois.

JOHN CLAY, JR.
DAVID CAMPBELL.

Subscribed and sworn to before me this 18th day of September, 1889.

[SEAL.] CHARLES H. DALGLEISH,
Notary Public, Cook County, Illinois.

Approved by—
H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Sept. 19, 1889. Wm. H. Bradley, clerk.

145 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein The Swan Land and Cattle Company, Limited, is complainant and Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, Godfrey Snydacker, in his own right and as administrator upon the estate of Louis Snydacker, deceased; Louis E. Frank, Henry L. Frank, Ellery E. Spinney, Bertha Snydacker, Alfred M. Snydacker, Emanuel Mandel, Isaac Loewenberg, Patrick Long, Eugene Arnstein, Samuel Marks, Charles E. Anthony, Charles A. Wilson, Alexander H. Swan, and Thomas Swan are defendants, as the same appear from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, northern division, this twenty-fifth day of September, 1889.

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: Case No. 13,734. N. Illinois C. C. U. S. No. 150. The Swan Land and Cattle Company, Limited, appellant, *vs.* Joseph Frank, Morris Rosenbaum, Joseph Rosenbaum, *et al.* Filed October 11, 1889.

148 US 603

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

No. 150.

THE SWAN LAND & CATTLE COMPANY, LIMITED, *Appellant,*

vs.

JOSEPH FRANK ET AL., *Appellees.*

Appeal from Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

WILLIAM H. SWIFT,
SOLICITOR FOR APPELLANT.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

IN THE

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OCTOBER TERM, A. D. 1892.

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CHICAGO:
BARNARD & GUNTHORP, LAW PRINTERS.
1892.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

THE SWAN LAND & CATTLE COMPANY, LIMITED, *Appellant*,

vs.

JOSEPH FRANK ET AL., *Appellees.*

Appeal from Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF FACTS.

The appellant in this case was complainant in the court below, and this appeal is prosecuted to reverse the decree of the court below, sustaining the demurrer of the defendants to the bill of complaint, and dismissing the bill for want of equity.

The facts of the case, as disclosed by the bill, are substantially as follows:

Complainant is a corporation organized under the companies acts of Great Britain. The defendants are all citizens of the State of Illinois, excepting Alexander H. Swan and Thomas Swan, who are citizens of Wyoming. These two citizens of Wyoming were not served with process, and have entered no appearance in the suit. On November 27, 1882, three corporations organized under the laws of Wyoming, and known as the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank & Anthony Cattle Company, being the owners of large herds of cattle and

other property in Wyoming, and engaged in the business of raising and selling what are known as range cattle, joined together in the making, with one James Wilson, of Edinburgh, Scotland, acting on behalf of himself, and others to be thereafter associated with him, a certain agreement, which is set out in full in the bill. (Rec., 5-11.) By the terms of this agreement, the said three corporations jointly agreed with said Wilson to sell and convey to a limited liability company, to be incorporated under the companies acts of Great Britain for the purpose of acquiring the property of said three corporations, all the lands and tenements, possessory rights to lands and tenements, water rights, improvements upon lands, houses, barns, stables, corrals, and other improvements and grazing privileges; also all live-stock, consisting of neat cattle, horses and mules, then belonging to said three corporations, or to either of them, also all live-stock, brands, tools, implements, wagons, harness, ranch, camp, and round-up outfits, and branding irons, then belonging to said three corporations, or to either of them, and then used by said corporations, or either of them, in carrying on the business of said companies, or either of them, on their ranches or ranges in Wyoming Territory, or wherever the same or any part thereof might be, which said lands and tenements, possessory rights, goods and chattels were particularly enumerated and described in certain inventories annexed to said agreement. The purchase price for said properties was to be $2,553,825. Such agreement further provided that the representations in the inventories annexed thereto, in regard to all property therein described, exeept the live stock, should be verified by competent inspectors, but as to all live-stock mentioned and described in said inventories, said three corporations agreed and guaranteed that the herd-books of said corporations, showing the acquisition, increase, disposition of, and number of, cattle then on hand, had been truly and correctly kept, and that a copy of all such entries duly certified by the secretaries of the said corporations respectively, should be furnished to said Wilson, with said agreement.

Shortly after the execution of this contract, said Wilson returned

to Scotland, and laid before certain parties the said agreement of sale, and a certain report of one Lawson, who is charged by the bill to have acted in the interest, and in the employ, of the said vendors. About the same time, Alexander H. Swan, who was the president of each of the vendor companies, went to Edinburgh, for the purpose of assisting said Wilson in inducing said parties to associate together to organize and float a company, and to assist in the formation and floating of such company. Said Swan took with him documents purporting to be copies of the herd-books of said three vendors, and laid the same before the parties whom Wilson was seeking to associate with him, and laid before said parties an estimate of the probable profits of the proposed corporation, which estimate was made upon the basis that said vendors would sell to said corporation 89,167 head of cattle, as specified in the agreement of sale. Copies of documents furnished by said Swan are attached as exhibits to said bill of complaint. Swan took with him to Edinburgh the business books of two of said vendors, namely: the Swan and Frank Live Stock Company, and the National Cattle Company, but did not take the books of the other vendor, the Swan, Frank & Anthony Cattle Company, because said last mentioned vendor had only been, as he said, a short time in existence. All of said books, with copies of the herd books of said vendors, were laid before a firm of chartered accountants in Edinburgh, by the parties whom Wilson and Swan sought to associate together to organize and float a company. The accountants called the attention of the parties to the fact that said books did not show any deduction from the numbers of the cattle of said vendors, on account of losses by death, and thereupon the said Swan represented to said accountants and to the parties, and induced them to believe, that any such losses were amply compensated for by the number of calves on the ranches, not included with those branded at the usual branding season. Swan had spent about ten years of his life, previous to that time, in that portion of Wyoming in which the herds of the said vendors were ranging, had himself collected together said herds, and managed them, had associated other parties with him, and had

caused the formation of said three Wyoming corporations, and was the president and manager of each of them, and was a large shareholder in each of them, and the parties whom said Swan induced to organize and float the complainant corporation believed, and still believe, that said Swan was entirely familiar with the condition of the properties he was selling, and, because of his relations to said properties and his knowledge of the same, said parties implicitly relied upon the representations made by him, that any death losses suffered by the herds of said vendors, were amply made good by the calves on the ranches which escaped branding at the usual branding season, and said Swan assured said parties that there was no doubt that said vendors had upon their ranches the full number of 89,167 cattle, which they had agreed to sell as aforesaid.

Said Alexander H. Swan had, prior to his departure to Scotland, been authorized, by resolutions of each of the vendor companies, to execute all conveyances and contracts which might be necessary or proper to carry into effect the stipulations of the above mentioned agreement, and authorizing him, in his discretion, to consent to any alterations in, or modifications of, said agreement as he might think expedient (excepting only as to the purchase price mentioned in the agreement, and as to the disposition of the proceeds of sale), and also authorizing him to make, as attorney in fact of said vendors, all such deeds, contracts, agreements, or other papers, as should be necessary to carry into effect the said agreement in its form as altered or modified.

Pending the negotiations above mentioned, at Edinburgh, certain supplementary agreements were entered into, between said vendors, as parties of the first part, and Alexander H. Swan himself, as party of the second part, and said Wilson, on behalf of said company to be formed, as party of the third part, providing for certain subscriptions to be made by said vendors and said Swan to the capital stock of said limited liability company, and providing that said Swan should become general manager of said limited liability company, at a salary of $10,000 per annum. Said supplementary agreements further provided that said limited liability company

should be formed on the basis of a certain prospectus and memorandum and articles of association, and the said vendors further agreed, in the last of these supplemental agreements, that if the calves branded in the year 1883, as the calves of the herds sold by said three vendors to said company to be formed, should be fewer in number than 17,868 head, said three vendors should jointly and severally be bound to pay to said company $31.68 for each head of the calves deficient.

Prior to the execution of the last mentioned additional agreement, a prospectus, memorandum of association and articles of association, of the proposed limited liability company, had been prepared, and said Swan had himself assisted in the preparation of the same, and copies of each of the same were signed by said Swan, as the attorney in fact of said vendors, and in his own right, and by said Wilson on behalf of the company to be formed, and such prospectus, memorandum of association and articles of association were made a part of said last mentioned additional agreement, and constituted the basis upon which the proposed company was to be formed and floated.

The said Edinburgh parties, relying upon the representations of said Swan, hereinbefore mentioned, and upon the report of said Lawson, and upon the inventories attached to said agreement of sale, and in said last mentioned additional agreement, issued a prospectus, during the month of March, 1883, calling for subscriptions for shares in a limited liability company, with a nominal capital of 600,000 pounds, and to be known as the Swan Land and Cattle Company, Limited. This prospectus was the same prospectus which had been approved by said Swan, as the attorney in fact of the said vendors, and said prospectus recited that detailed inventories were attached to the agreement of sale, and made a part thereof; that the vendors had exhibited copies of the herd-books of said vendors, which corresponded with said inventories, and that the vendors guaranteed that said herd-books, showing the acquisitions, increase, disposition of, and number of, cattle on hand, had been truly and correctly kept, and that copies of said agreement, in-

ventories and herd-books might be seen by parties desiring to subscribe for shares, at the offices of certain brokers and solicitors named in said prospectus, a copy of which prospectus is attached as an exhibit to the bill of complaint.

A sufficient number of subscriptions having been procured, the Swan Land and Cattle Company, Limited, the complainant corporation, was legally incorporated on the 30th of March, 1883. Shortly thereafter, complainant adopted the above mentioned agreement of sale, between said vendors and Wilson, as modified by said supplementary and additional agreements, and the vendors accepted the complainant corporation as the company with which the agreements of said vendor should be carried out.

In the month of April, 1883, the proposed purchase was consummated, by the payment of the full purchase price of $2,553,825 by complainant, less certain deductions for expenses, which were agreed upon between the vendors and complainant, and deeds and bills of sale were delivered to complainant, and complainant took possession of the properties transferred to it.

The complainant further alleges that the vendors represented to it that it was impossible to count the cattle which the vendors had agreed to sell to it, and that complainant would be obliged to take possession of the same wherever they might be ranging, without any count whatever, but that as to all other property sold, excepting said cattle, complainant might have the same inspected, and the vendors would make good any deficiencies found by such inspection, and that complainant relying upon the representations made to it by the vendors, and relying upon the guaranties above mentioned, and believing that it was impossible to count said cattle, consented to receive delivery of said cattle without any count, and took them wherever they were ranging. Immediately upon the consummation of said transfer, said Swan took charge of said herds, and of all said ranch property, as manager of complainant, at a salary of $10,000 per year, and continued to act as such manager until shortly before the filing of the bill of complaint.

The bill then sets out at considerable length, (Rec., 27–30) facts

showing, or tending to show, that the representations made by said vendors, as to the number of calves branded in 1883, and as to the total number of cattle delivered by the vendors to complainant, were grossly untrue, and that such representations were known to said vendors to be untrue, and that it was not impossible, as represented by said vendors, to count the said cattle, but that said vendors were unwilling to have said cattle counted, because they knew that such count would show that they did not have the number which they purported to have and agreed to sell; that there were at least 30,000 head of cattle less, in the herds sold to complainant, than said vendors represented themselves to have, and that complainant has suffered a damage in consequence of such deficiency, and in consequence of the misrepresentations of said vendors, to the amount of at least Eight Hundred Thousand Dollars ($800,000).

The bill then continues as follows:

> Your orator further showeth that said vendors had no other business except the management of the herds sold to your orator, and no other assets, or substantially none, except the properties sold by them to your orator, and your orator showeth, that after the sale of their said properties to your orator, and the receipt by them of the purchase price, as aforesaid, said three vendors paid whatever liabilities they had outstanding, except their liability to your orator herein set fourth, and distributed the money and stock obtained from your orator as the proceeds of said sale, and all their other assets amongst their respective shareholders, and the same were received by said shareholders, and since that time said three corporations have not, nor has either of them, made any use whatever of their franchises, but they have abandoned the same; and neither of said corporations has any officer or agent upon whom process can be served, and they have not, nor has either of them, any assets of any kind out of which any judgment at common law against them, or either of them, could be satisfied.
>
> Your orator further showeth that the assets of said corporations were in the hands of said corporations a trust fund, held by said corporations in trust to satisfy the claim of your orator herein set forth, before the shareholders of said corporations were entitled to receive any portion of the same, and said shareholders, in receiving said assets, did take, and now hold

the same, as trustees in place of said corporations, and subject to the lien of your orator's aforesaid claim. And your orator showeth that all of the defendants herein, and one, Louis Snydacker, were shareholders in some one or more of said corporations, and received their proper shares of the assets of said corporations when said assets were distributed by said corporations as aforesaid, and said defendants hold the assets received by them, as aforesaid, as trustees, and should account for the same to your orator, and apply the same, so far as necessary, in satisfaction of your orator's claim herein set forth. And your orator showeth that said Louis Snydacker has died intestate, since the said vendors distributed their assets as aforesaid; that said Louis Snydacker received, as shareholder in one or more of said vendors, a portion of said assets, and said Godfrey Snydacker, who has been duly appointed, and still is administrator upon the estate of said Louis, should account to your orator for that part of said assets received by said Louis.

Your orator further showeth that your orator has made defendants to this bill of complaint, all the persons who reside in, or are now within the jurisdiction of this honorable court, and known to your orator to have been shareholders in said three corporations, the vendors, or any or either of them, at the time of the occurrence of the matters herein complained of. But in case any other of said shareholders, not made defendants herein, shall hereafter come within said jurisdiction, your orator desires to make such shareholders additional parties defendant hereto. (Rec., 31–32.)

The vendor corporations are not made parties to the bill, and as complainant is a foreign corporation, and the vendor corporations were organized under the laws of the Territory of Wyoming, they could not be made parties without ousting the jurisdiction of the court.

The bill prays that the defendants may be required to answer the several interrogatories set forth in said bill, and prays that whatever the defendants, or either of them shall have received from the said vendor corporations, or any or either of them, as, or on account of their or his share of the proceeds of said sale to complainant, shall be decreed to have been taken and to be held by said defendants or defendant, in trust, for the payment of complainant's claim, and that the same may be applied, so far as shall be necessary, in satisfaction

of the damages which shall be found to be due to the complainant from the said vendors, and prays for such further or other relief as the nature of the case may require.

The interrogatories contained in said bill are numerous, and seek discovery upon various points, but mainly as to the disposition made of the proceeds of sale of the property sold to complainant.

Appellees demurred to the bill upon the following grounds:

First. That said complainant hath not in and by its said bill made or stated such a case as this court can take jurisdiction of, or as doth or ought to entitle it to any discovery or relief as in said bill is sought and prayed for from or against these defendants.

Second. That in and by said bill it appears that the Swan and Frank Live Stock Company, The National Cattle Company and The Swan, Frank and Anthony Cattle Company are, and each of them is a necessary party to the said bill, inasmuch as it therein is alleged that the said companies and each and all of them made and entered into the contract of sale therein mentioned, and made the several representations therein complained of as false and fraudulent; and that in and by the said bill it appears that the liability for damages arising from said false and fraudulent representations is primarily that of the said companies, and is only secondarily that of these defendants, and the object of the said bill is to compel the payment of the debt of the said companies; but the said plaintiff hath not made the said companies parties to the said bill.

Third. That it appears in and by the said bill that the sale therein mentioned was made by said three companies jointly, but does not say that these defendants were stockholders in all of them, or in any particular one of them, nor that as the stockholders of any one of them, they or any of them received any part of the said purchase price, or that if the company of which any individual one of these defendants was a stockholder, received any part of the said purchase price of the property in said bill mentioned, yet the debts of the said company were not sufficient to exhaust all of its respective share of the purchase price of said property.

Whereby, it is made to appear that some of these defendants are in no way interested in the several and distinct mat-

ters and causes of complaint in the said bill alleged; and by joining several distinct matters together, which do not depend upon each other, the proceedings in the progress of the said suit will be intricate and prolix, and these defendants and each of them, put to unnecessary charges and expenses in matters which in no way relate to or concern them. (Rec., 125–126.)

The court below sustained the demurrer, and dismissed the bill for want of equity. It appears from the opinion of the court below (Rec., 130–140), that the demurrer was sustained (1) because the vendor corporations are indispensable parties to the suit, and (2) because complainant cannot maintain its suit as creditor at large of the vendor corporations.

Assignment of Error.

And now comes said The Swan Land and Cattle Company, Limited, the appellant, by William H. Swift, its solicitor, and says, that in the record and proceedings, and in rendering the decree aforesaid, there is manifest error, in this, that the court erred in sustaining the demurrer of the defendants to the bill of complaint, and in dismissing said bill of complaint for want of equity. By reason whereof, appellant prays that said judgment may be reversed, etc.

By William H. Swift,
Its Solicitor.

SYNOPSIS OF ARGUMENT.

I. The vendor corporations are not indispensable parties to the suit, because

1. These corporations are practically dissolved. As between an unpaid creditor of a corporation and stockholders who have abandoned their corporate franchises, have distributed among themselves all the assets of the corporation, and have thus rendered the corporation unable to respond to the creditor, a surrender of the corporate franchises, and a dissolution of the corporation will be presumed.

And a court of equity will take jurisdiction of a suit by an unpaid creditor of a dissolved corporation, against the former stockholders of the corporation, to reach assets of the corporation distributed by the stockholders.

Slee v. *Bloom*, 19 Johns., 456.
Penniman v. *Briggs*, 1 Hopkins Ch., 343.
Briggs v. *Penniman*, 8 Cow., 387.
Bank of Poughkeepsie v. *Ibbo'son*, 24 Wend., 472.
Bruce v. *Platte*, 80 N. Y., 379.
States Saving Association v. *Kellogg*, 52 Mo., 583.
Central Agricultural & Mechanical Association v. *Alabama Gold Life Insurance Co.*, 70 Ala., 120.
Gibbs v. *Davis*, 27 Fla., 531.
Carey v. *The Cincinnati & Chicago Railroad Co.*, 5 Ia., 359.
Stone v. *Framingham*, 109 Mass., 303.
Wiswell v. *Starr*, 48 Me., 401.
Dane v. *Young*, 61 Me., 160.
Bacon v. *Robertson*, 18 How., 480.
Curran v. *State Bank of Arkansas*, 15 How., 304.
Chicago, Rock Island & Pacific Railway Co. v. *Howard*, 7 Wall., 392.
Broughton v. *City of Pensacola*, 93 U. S., 266.

The following cases distinguished:

Brinkerhoff v. *Brown*, 7 Johns. Ch., 217.
Bradt v. *Benedict*, 17 N. Y., 93.
Kincaid v. *Dwinelle*, 59 N. Y., 548.
New York Marbled Iron Works v. *Smith*, 4 Duer, 362.
Hollingshead v. *Woodward*, 35 Hun., 410.
Boston Glass Manufactory v. *Langdon*, 24 Pick., 49.
First National Bank of Bethel v. *National Pahquioque Bank*, 14 Wall., 383.
National Bank v. *Insurance Co.*, 104 U. S., 54.
Town v. *Bank of River Raisin*, 2d Douglas (Mich.), 530.
Brandon Iron Co. v. *Gleason*, 24 Vt., 228.
Hodsdon v. *Copeland*, 16 Me., 317.

2. Even if the vendor corporations are not actually dissolved, their existence consists in a mere legal capacity, inherent in the stockholders, to re-organize and resume the exercise of corporate powers; and in case the stockholders of the vendor corporations should ever again re-organize and resume their abandoned franchises, the property which was distributed among the several stockholders, by unanimous consent of all, could not be reclaimed by such corporations. The vendor corporations, in their present state of existence as mere legal potencies, or in a revived and re-organized state, could assert no claim to, or interest in, the property out out of which appellant now seeks to satisfy its debt. These corporations are not, therefore, indispensable parties to this suit, especially in view of the provisions of Equity Rule Number 47, and of the provisions of Section 737 of the Revised Statutes of the United States.

Shields v. *Barrow*, 17 How., 130.
Barney v. *Baltimore City*, 6 Wall., 280.
Williams v. *Bankhead*, 19 Wall., 563.
Morawetz on Corporations, 2d Ed., Sec. 1,008, n. 1.
Bank of Fort Madison v. *Alden*, 129 U. S. 372.

Graham v. *Railroad Co.*, 102 U. S., 148.
Scovill v. *Thayer*, 105 U. S., 143.
Hatch v. *Dana*, 101 U. S., 205.
Walser v. *Seligman*, 13 Fed. R., 415.
Wellman v. *Howland Coal & Iron Works*, 19 Fed. R., 51.
Ervin v. *The Oregon Railway & Navigation Co.*, 20 Fed. R., 577.
Appeal of Stang, 10 Weekly Notes of Cases, 409.
Silver Valley Mining Co. v. *The Baltimore, etc., Co.* 99 N. C., 445.
Bump on Fraudulent Conveyances, 3d Ed., p. 548.
Buffington v. *Harvey*, 95 U. S., 99.

The following cases distinguished:

Kendig v. *Dean*, 97 U. S., 423.
Wood v. *Dummer*, 3 Mason, 308.
Lyman v. *Bonney*, 101 Mass., 562.
Inhabitants of Deerfield v. *Nims*, 110 Mass., 115.
Patterson v. *Lynde*, 112 Ill., 196.
First National Bank v. *Smith*, 6 Fed. R., 215.
Dormitzer v. *Illinois & St. Louis Bridge Co.*, 6 Fed. R., 217.
Walsh v. *Railroad Co.*, 6 Fed. R., 797.

II. Appellant is entitled to prosecute this suit as a creditor at large of the vendor corporations, because:

1. These corporations are virtually dissolved, and a creditor at large of a dissolved corporation can maintain a bill against distributers of its assets.

Wood v. *Dummer*, 3 Mason, 308.
Howe v. *Robinson*, 20 Fla., 352.

2. And if these corporations are so far existent as to be amenable to valid service of process, the bill alleges facts which show that a judgment at law against them must of necessity be a barren for-

mality and utterly fruitless. And courts of equity do not require any vain thing.

Case v. *Beauregard*, 101 U. S., 688.

Hibernia Ins. Co. v. *St. Louis and New Orleans Transportation Co.*. 10 Fed., R. 596.

Sage v. *Memphis etc. Railroad Co.*, 125 U. S., 361, 376.

Hodges v. *Silver Hill Mining Co.*, 9 Ore., 200.

State Savings Association v. *Kellogg*, 52 Mo.. 583.

Sprague-Brimmer Company v. *M. J. Murphy Company*, 26 Fed. R., 572.

Cook on Stock and Stockholders, 2d Ed., Sec. 200.

The following cases distinguished:

Taylor v. *Bowker*, 111 U. S., 110.

Walser v. *Seligman*, 13 Fed. R., 415.

ARGUMENT.

In this argument we shall consider:

1. Whether there is an incurable defect of parties.

2. Whether complainant has any standing in a court of equity as a creditor at large of the vendor corporations.

I.

THE VENDOR CORPORATIONS ARE NOT INDISPENSABLE PARTIES TO THE SUIT.

We shall endeavor to show that the vendor corporations are not indispensable parties to this suit, first, because these defendants, and all other stockholders of the vendor corporations, voluntarily abandoned their corporate franchises, and the vendor corporations should be treated, as between the parties to this suit, as dissolved corporations; and second, because even if the vendor corporations be not dissolved, they have parted with all their interest in the property which complainant seeks to reach, and a decree can therefore be rendered in this suit, without in any way affecting the rights of the vendor corporations, and without exposing these defendants to any liability to account either to the said vendor corporations, or to any other creditor of such corporations, for the property which complainant now seeks to reach.

1. *The vendor corporations are practically dissolved.*

It is no doubt true that a technical dissolution of a corporation, at common law, can be accomplished only by expiration of its charter, by an accepted surrender of the corporate franchise, or by legislative or judicial act. The bill does not allege that the vendor corporations were dissolved in either of these ways.

The considerations which seem to us decisive of this case, and which we shall, therefore, urge upon the court, do not make it

necessary for us to enter upon an examination of the erudition of the dissolution of corporations at common law. It has been decided, times without number, that mere nonuser, or misuser of corporate powers, the loss of all assets, and the failure to maintain a corporate organization, do not, of themselves, and for all purposes effectuate the dissolution of a corporation. Many of these cases, will doubtless be cited by counsel for appellees. But these cases are not decisive of the case at bar, because the facts of the case at bar seem to us to call for the application of a different rule, based upon different principles. Most of the cases referred to are cases in which suits were brought by, or on behalf of, corporations, and the defendants, having apparently no defense on the merits, sought inequitably to escape liability, by pleading the previous dissolution of the corporations, or in which the plaintiffs sought inequitably to assert some right in, or claim to, property of corporations, which right or claim was based upon the theory that the corporations, by reason of their dissolution, had lost their capacity to take or to hold the property in question.

We believe that a careful scrutiny of the cases will bear out the statement that whenever courts have treated corporations as still existent, after their substance has disappeared and the objects sought to be obtained by the corporate organizations have either proved to be unattainable or have been voluntarily abandoned, there have been some substantial equities to be protected or enforced, which required, or seemed to require, that the fiction of corporate existence should be maintained after all corporate vitality had become extinct.

The proposition which appellees must establish in order to defeat the action at bar, is very nearly the converse of this. The facts alleged by the bill, and admitted by the demurrer, show that appellees are in possession of a large amount of property, to which appellant is equitably entitled. If appellant's claim is ever to be satisfied, it must be satisfied out of property of these corporations, distributed by appellees and other stockholders among themselves. The vendor corporations had ceased to have any substantial exist-

ence years before the bill in this case was filed. Appellees are the very persons who stripped these corporations of all their substance, and thus rendered them utterly incapable of responding to any claim, and, furthermore, showed every indication of actual intention to abandon them altogether. And now, when this appellant calls upon these persons to satisfy its claims, they set up the continued existence of these abandoned legal fictions, and seek to shelter themselves behind them. This, we say, they ought not to be permitted to do.

The necessities of the case at bar do not call for the application of any wider rule than this: that as between an unpaid creditor of a corporation, which has disposed of all its business and property, and the stockholders of that corporation, who have distributed among themselves all the assets of the corporation, have ceased to maintain any corporate organization, and have shown clear intention to abandon their franchise, a court of equity will, for the purpose of affording adequate relief to the creditor, presume a voluntary surrender of the corporate franchise, and a consequent dissolution of the corporation.

The justice of this rule seems to us to be self-evident; and we shall endeavor to show that it has long been recognized and applied by courts of high authority. Before proceeding to examine the cases to which we would ask the attention of the court, we would remark upon what seems to us to be the necessity for the full recognition and application of this rule, growing out of a change in the habits of the business community. In times past, when the formation of a corporation was attended with imposing formalities, a corporation, when dead, was thought to be worthy of a decent burial. With the advent of the formation of corporations under general law, with little formality or expense, it may be said that the simple abandonment of corporate forms which have become useless, has now become the rule, and that voluntary proceedings on the part of stockholders for the formal dissolution of corporations has become the exception. This consideration goes chiefly to the question of intention. That is, the continued non-user of corporate

franchises becomes more and more clearly indicative of an intention on the part of stockholders to abandon those franchises, and a state of facts which a half century ago might not warrant a court in presuming an intention to surrender corporate franchises, would now, under the changed habits of the community, entirely warrant such presumption. This court, in the case of *Bacon* v. *Robertson*, 18 How. 480, speaking through Mr. Justice CAMPBELL, adopted Lord COTTENHAM'S language in *Walworth* v. *Holt*, 4 M. & C.,635, that it is the duty of a court of chancery "to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to rules and forms established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy."

The rule which we have above stated has been applied in a large number of cases in which creditors have sought to charge stockholders of corporations with liability under state statutes which make stockholders of dissolved corporations personally liable to creditors for the debts of the corporations to the extent of their respective shares. In such case, a cause of action arises in favor of the creditor, only upon dissolution of the corporation, and the question has been in each case, whether the facts shown by the record establish a dissolution of the corporation within the meaning of the statute.

The leading case of this class is the case of *Slee* v. *Bloom*, 19 Johnson, 456. In that case appellant Slee had filed a bill on April 24, 1819, as judgment creditor of a corporation, the Dutchess Cotton Manufactory, against certain stockholders of that corporation, alleging in substance that on February 1, 1818, all the real and personal property of the corporation had been sold under execution; that no election of trustees had been made since 1817, and the stockholders had come to a resolution never to make another election, but "to abandon the factory and corporation altogether"; that there had bean no meeting of the stockholders since May, 1817, and that the trustees had not had any meeting or transacted any business since December, 1817, but had "determined to abandon

"and give up the factory and corporation, and not to make any "further calls on the stockholders, nor to provide any means what- "ever to pay the appellant; but the trustees, with all the other re- "spondents, had determined to suffer and cause the corporation to "be dissolved, and had already suffered and caused the same to be "dissolved, by their said transactions and omissions in relation "thereto."

The chancellor decided that the bill could not be maintained "inasmuch as the said corporation did not appear, in judgment of "law, dissolved, nor could it be dissolved within the period limited "by statute under which it was erected, for any non-user or mis- "user of its franchises, without due process of law." Upon appeal to the Court of Errors, the decision of the chancellor was reversed. SPENCER, Ch. J., in delivering the opinion of the court, reversing the decree of the chancellor, said:

> "In coming to the conclusion that the corporation, in this case, is dissolved, I lay out of the case everything of misuser, or non-user, excepting the influence which the fact of non-user may have as evidence, connected with other facts, to show the renunciation of the corporate rights. Upon the authorities, and for the reasons given by the chancellor, misuser or non-user cannot be relied on as a substantive and specific ground of a dissolution. (474.) * * *
>
> "The bill charges, substantially, that the corporation is dissolved; and not one of the respondents asserts that it does exist, or that there is the remotest idea of resuscitating it. Here is, then, a corporation possessed of nothing, abandoning the end and object of their institution, without pretending that they ever hope or expect to resume their functions; and, it may be added, all the corporators either admit the dissolution of the corporation (I speak of those who have suffered the bill to be taken *pro confesso*), or deny, that they are corporators. Thus, presenting the phenomenon of a corporation without corporators, a nominal, inert body, pretending to have life and existence. Such an anomaly cannot be recognized. The argument is, that being incorporated for twenty years, there exists a corporate capacity during that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The second section of the act provides, that, as soon as the certificate shall be filed, the persons who shall have

signed and acknowledged the same, and their successors, shall, for the term of twenty years next after, be a body politic and corporate, in fact, and in name, &c. The legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during that period, *nolens volens*. It was implied, that during that time they should do nothing to forfeit their rights, nor surrender them back, nor do any act tantamount thereto. The act prolongs the corporation for twenty years, subject to all the incidents attending corporations; and I have endeavored to show, that one of the incidents is, an extinction of the corporation, if it does what is equivalent to a surrender. I doubt, extremely, whether the capacity to resume the functions of the corporation, does, in fact, exist; but it is not necessary to decide that point. I consider it merely as a matter of speculation, thrown out, without any practical reference to the cause, as a stumbling block to the attainment of justice between the parties. For all the substantial purposes of justice, and in effect, the corporation is dissolved. (476.) * * *

"In point of good sense, this corporation was dissolved, within the meaning and intent of the act, as regards creditors, when it ceased to *own* any property, real or personal, and when it ceased, for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being, and design of the corporation were completely determined; and if even it had the capacity to reorganize and reinvigorate itself, the case has happened, when, as relates to its creditors, it is dissolved." (478.)

The rule stated by Chief Justice Spencer in this case has been the settled rule in New York ever since the year 1822, when this case was decided. It was claimed by the learned counsel for appellees, in their brief in the court below, and it will doubtless be claimed by them in this court, that subsequent decisions in New York have, in some instances "repudiated" the doctrine of *Slee* v. *Bloom*. An examination of such decisions will show that this is a misapprehension.

In the case of *Penniman* v. *Briggs*, 1 Hopkins Chancery, 343 (decided in 1824), the Chancellor applied the rule laid down in *Slee* v. *Bloom*, and re-stated it, in some respects, more strongly and cogently than it had been stated by Chief Justice Spencer. In that case, all the real and personal property of a certain corporation was

sold under execution in January, 1818, and "having ceased to hold any property whatever, and being totally insolvent, ceased to manufacture, or to act as a corporation in any respect." The complainants filed their bill to charge the stockholders of the company, under the statute, alleging that the company was dissolved. It does not appear from the report of the case, whether the complainants had recovered judgment against the corporation, or not. The chancellor held that the corporation was, in contemplation of law, dissolved. In the course of his opinion he said :

> "All the objects for which this corporation was instituted, have been relinquished ; all its funds have been applied to the payment of its debts ; and some of its debts remain unpaid. It has long since ceased to operate, as a manufacturing company ; and excepting an election of trustees, since its bankruptcy, it has ceased to act, in all respects whatever. The company has ceased to exist, in fact ; and the defendants claim for it nothing more than a legal or potential existence. A mere omission to exercise a corporate franchise, is not a forfeiture of the franchise, or a dissolution of the corporation. But this is not merely a case of omission to exercise corporate rights. Besides the omission to use the corporate powers here, is an entire inability to exercise them, by reason of a total want of funds. The omission to act, and an inability to act, are facts which attend each other, in this case. Many other corporations, such as those instituted for police, or for the administration of various concerns, civil, religious and literary, may well exist and execute the purposes of their institution, without funds. But funds are essential to a corporation like this, which can never honestly execute any of the purposes of its creation without property. It is said, that this company may resume the business of manufacturing, and may be revived. It never will be revived, unless its stockholders should advance their private property, to resuscitate a ruined company. Such an event is not to be expected from stockholders, who are now unwilling to discharge the existing debts of this company; nor can it be supposed, that this deceased company, charged with unpaid debts, will be revived in order to manufacture wool, while all persons are at liberty to manufacture without an incorporation, and when a new incorporation for manufacturing may be easily obtained. The total failure of all the purposes of this incorporation; the length of time which has elapsed since the corporation has fulfilled any of the ends of its institution; the des-

perate state of its remaining affairs; and all the circumstances of the case, sufficiently show that this company has virtually surrendered its corporate rights. The true question here is, whether this company is or is not dissolved, in the sense of the statute authorizing its creation. The statute not only limits the duration of such a company to twenty years, but it also contemplates its dissolution, as an event which may occur within that term. The remedy given to creditors against stockholders, is evidently intended for every mode of dissolution, and for all the cases of dissolution which may deprive a creditor of an effectual remedy against the corporate body. The Cambridge Farmers' Woolen Manufactory is a company without funds, and utterly bankrupt; a manufacturing company which does not manufacture; a company which possesses nothing, and for a long time has done no act whatever; an extinct association, whose corporate name seems to be retained and claimed by the association merely as a shield to themselves against personal responsibility."

An appeal was prosecuted from the decision of the chancellor in the last mentioned case, and the decision of the chancellor was affirmed, upon appeal, by the Court of Errors, in the case of *Briggs* v. *Penniman*, 8 Cow., 387. Justice WOODWORTH, in the course of his opinion in that case, says, referring to *Slee* v. *Bloom*:

> "If a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. It cannot be doubted that a corporation may be dissolved by such a surrender. This is a stronger case, for here the trustees do not possess the power to resuscitate the company by a call on the stockholders. Their shares are paid, and who would become a new subscriber to an insolvent company?" (391.)

These remarks of Justice Woodworth are pertinent to the case at bar, for, as we shall hereafter have occasion to state more at length, the vendor corporations, having distributed all their assets among their stockholders, by unanimous consent of all the stockholders, it is beyond the power of the vendor corporations to recover those assets by any form of action.

In the case of the *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend., 473, (decided in 1840), the same rule was applied to substantially the same state of facts as were presented in the cases of *Slee* v.

Bloom and *Penniman* v. *Briggs*, *supra*, and the same rule was applied.

In the case of *Bruce* v. *Platte*, 80 N. Y., 379 (decided in 1880), the cases of *Slee* v. *Bloom*, *Penniman* v. *Briggs*, and *Bank of Poughkeepsie* v. *Ibbotson*, are cited with approval. In that case an action had been brought against a trustee of a manufacturing corporation, to charge him, under the statute, with a debt of the corporation, because of its failure to make and file an annual report, as required by the statute. The defense was, that prior to the time when the corporation was charged with failure to make a report, it had been dissolved. It was not claimed that there had been any judicial or legislative dissolution of the corporation, but that it was dissolved by virtue of its having ceased to carry on business, having no property and having no ability or intention to resume business. (385.) This defense was sustained by the Court of Errors.

Not less interesting are the cases in which the courts of New York have declined to apply the rule laid down in *Slee* v. *Bloom* to a different state of facts. In some of these cases, as for example, in *Brinkerhoff* v. *Brown*, 7 Johns. Ch., 217, and in *Bradt* v. *Benedict*, 17 N. Y., 93, it appeared from the record that the corporations which were alleged to have been dissolved by virtue of loss of property and cessation of business, had means, either in the shape of uncalled capital, or of actual tangible property, with which the corporations had never parted, and that the discontinuance of business had not continued so long as to raise any presumption of an intention on the part of the stockholders to abandon the corporate franchises.

In other cases decided by the courts of New York, the rule laid down in *Slee* v. *Bloom* was not applied, because the equities of those cases required the application of a different rule. As we have above suggested the question whether a corporation is to be considered, for the purpose of any particular proceeding, as dissolved, is one which courts of equity do not decide by any hard and fast rules. Courts of equity do not presume dissolution in favor of an inequitable claim or defense. Such presumption is in-

dulged only for the purpose of affording adequate and speedy remedy for the enforcement of a claim clearly equitable. No better illustrations of this principle could be found than the cases cited by counsel for appellee, in the court below, in their attempt to weaken the authority of *Slee* v. *Bloom*.

Take, for example, the case of *Kincaid* v. *Dwinelle*, 59 N. Y., 548. In that case a corporation had been enjoined from exercising its corporate rights, and had been placed in the hands of a receiver. Shortly after the receiver had been appointed, an employe of the corporation had begun suit against the corporation for his salary, and judgment was entered against the company by default. More than two years after the appointment of the receiver, an action was brought by an assignee of the judgment, against a stockholder of the company, to enforce the statutory liability of the stockholder, and the stockholder pleaded that the service of process on the corporation was invalid, because the corporation had become dissolved by virtue of the appointment of the receiver, and the injunction restraining it from exercising its corporate powers, and that the action against the stockholder was barred by the failure of complainant to bring action within two years after the dissolution of the corporation. The stockholder thus sought, by setting up the dissolution of the corporation, to evade his liability to the creditor. This defense was disallowed, and the action was held maintainable—the court holding that the appointment of the receiver and the injunction did not cause a dissolution of the corporation. The same conclusion was reached, upon substantially the same state of facts, in two other cases in the same state, relied upon by counsel for appellees, namely, *New York Marbled Iron Works* v. *Smith*, 4 Duer, 362, and *Hollingshead* v. *Woodworth*, 35 Hun, 410.

And in this connection we would ask the attention of the court to the case of the *Boston Glass Manufactory* v. *Langdon*, 24 Pick., 49, from which his Honor, Judge BLODGETT, quotes at some length in his opinion in the court below. (Rec., 37.) In that case the plaintiff corporation brought suit against the defendant, upon a promissory note, given by the defendant to the plaintiff. The de-

fendant pleaded in defense the dissolution of the corporation prior to the beginning of the suit. The defendant supported the plea by proof that the plaintiff corporation had made an assignment for the benefit of its creditors, and had omitted to hold annual meetings, and to transact business for a considerable length of time. This plea was overruled, as it doubtless would, and ought to have been, even if it had been supported by much stronger evidence than the defendant was able to adduce in proof of a virtual surrender of the corporate franchises. In fact the court says that "there was noth-"ing in that case which showed an intention of the corporators to "surrender or forfeit their charter, nor anything which could be "construed into a surrender or forfeiture."

So, also, the two cases decided by this court, namely: *First National Bank of Bethel* v. *National Pahquioque Bank*, 14 Wall., 383, and *National Bank* v. *Insurance Company*, 104 U. S., 54, which were cited as authority, in the opinion of the court below, were cases in which the dissolution of the corporations therein mentioned was set up as a defense by, or on behalf of the corporations themselves, to actions brought by creditors against those corporations.

Unless we have utterly failed to make our meaning clear in the foregoing pages, cases such as those last mentioned do not even tend to show that stockholders themselves should be permitted to plead, in defense of such a suit as the record at bar discloses, the continued existence of corporations whose property they themselves have distributed among themselves, and whose franchises they have shown every indication of intention to abandon.

It has not been left to the State of New York alone to recognize and enforce a rule so obviously equitable as that laid down in *Slee* v. *Bloom*. The learned counsel for appellees did indeed assert, in their brief in the court below, and probably will claim in this court, in reference to the case of *Slee* v. *Bloom*, that "outside of New "York the case has been rarely, if ever, followed." A very brief examination will show that in this again they are entirely mistaken.

In the case of the *State Savings Association of St. Louis* v. *Kel-*

logg, 52 Mo., 583, an action was brought by a creditor at large against the stockholders of the South-Western Freight and Cotton Press Company, under the statute of Missouri, which declared that if any company, formed under the act, dissolve, leaving debts unpaid, suit might be brought against the persons who were stockholders of the company at the time of the dissolution. The corporation had become wholly insolvent, and had been adjudged a bankrupt, and was totally without funds or means, and it was claimed by virtue of these facts it had become dissolved within the meaning of the statute. The court held that the action was maintainable. After briefly discussing the cases of *Slee* v. *Bloom* and *Penniman* v. *Briggs*, *supra*, the court, speaking by Judge WAGNER, says:

> "Now, the averment in the petition was that when the company presented its petition to the United States District court it was dissolved, being wholly unable, by reason of a total want of funds and means, to exercise its corporate powers. The answer admitted the total want of funds and means, the absolute destitution of assets, but denied the legal inference that the corporation was thereby dissolved within the meaning or sense in which that word is used in the statute.
>
> When the corporation was utterly penniless, for what end or object did it continue? What good did it do the creditor to be told that there was the naked shadow, but that the substance was all gone? The corporation, for all essential purposes, was as effectually dissolved as if a solemn judgment of court had been pronounced to that effect. I have no hesitation in coming to the opinion that there was such a dissolution as would afford creditors a remedy against the individual shareholders.

In the case of the *Central Agricultural and Mechanical Association* v. *Alabama Gold Life Insurance Company*, 70 Ala., 120, a bill was filed against certain stockholders of the corporation, to enforce the personal liability of the stockholder, arising out of a statute similar to the statute of New York under consideration in *Slee* v. *Bloom*, and other cases. It was not claimed in that case, that the corporation had been dissolved at common law, but that it was practically dissolved by virtue of its having no property or means, and by virtue of the complete cessation of its business. The court,

in deciding that the corporation was dissolved within the meaning of the statute, said:

> "The liability is contingent—dependent on the dissolution of the corporation. That is the event rendering it capable of enforcement. (*Smith* v. *Huckabee*, 53 Ala., 191.) It was, perhaps, true at common law, that a corporation was capable of dissolution only by abuse or misuse of its franchises, and a consequent judicial forfeiture, by surrender, accepted of record; or by the death of all its members. (2 Kent, 378; *Corporation of Colchester* v. *Seaber*, 3 Burr., 1,866.) This doctrine, it has often been said, can be of very limited application to the private corporations in this country, organized for commercial, or trading, or business purposes, which are but little more than special partnerships. In respect to these corporations, liability for the debts of the corporation, due at the time of dissolution being imposed on the members, it has been repeatedly held, that a dissolution according to the modes of the common law is not intended. Whenever there is a practical dissolution, so far as the rights and remedies of creditors are concerned—whenever the corporation becomes 'a nominal, inert body,' its property and funds gone, and it is reduced to insolvency, rendering legal remedies against it fruitless and unavailing—the liability of the stockholder or member becomes absolute, and the right and remedy of the creditors to enforce it accrues."

The case of *Slee* v. *Bloom*, is cited as authority.

In the case of *Gibbs* v. *Davis*, 27 Fla., 531, (decided in 1891), a a creditor of a corporation brought suit to charge a stockholder with statutory liability growing out of the alleged dissolution of the corporation. In deciding that the action was maintainable, the court says:

> "It is contended for the defendant in this case that, before resort can be had upon him as a shareholder for a debt of the company, the dissolution of the corporation must first be declared and established either by legislative enactment, or by the judgment or decree of some court. The decided weight of authorities is against this view of the question, and the proposition may now be said to be settled that where the statute makes the dissolution of the corporation a condition precedent to the enforcement of the shareholder's liability, the dissolution, in the sense in which the term is here used, takes place when the corporation comes into a condition of having debts and no assets, and has ceased to act and exercise its cor-

porate functions, or has suffered acts to be done which end the object for which it was created."

Citing *Slee* v. *Bloom*, and other authorities.

The application of the rule laid down in *Slee* v. *Bloom*, has by no means been confined to cases in which creditors sought to charge stockholders of corporations with statutory liability.

In the case of *Carey* v. *The Cincinnati & Chicago Railroad Company*, 5 Iowa, 359, the complainant alleged that he had been induced, by false representations, to convey certain lands situated in the State of Iowa, to the *Cincinnati, Newcastle and Michigan Railroad Company*, an Indiana corporation, in trust, to aid in the construction of that road. It was claimed by complainant, among other things, that "the company had ceased to act as a corporation, and had become dissolved by its own acts and omissions; that its office had been closed for more than two years; that there were no officers; that the seal had been sent out of the State of Indiana, and that at the time of the dissolution, the company had not conveyed away the said land, and thereupon the title thereto reverted to him." The defendants demurred upon several grounds, of which we need specify only two, namely: (1) That plaintiff showed no legal proceedings by which the existence of the corporation had been terminated, nor by which it had been declared not to exist, and (2) That the bill alleged irregularities in the creation and existence of the corporation under the laws of Indiana, but did not show any legal proceedings declaring the charter forfeited, and that the Iowa courts could not inquire into them in that collateral proceeding. The court held these grounds of demurrer untenable. Chief Justice WRIGHT, delivering the opinion of the court, said:

> "And, again, if it be true, as charged, that said corporation has, by its own acts, ceased to exist; or that it has suffered acts which destroy its end, it is as fully and entirely dissolved, as if declared so to be, by the sentence of a competent court. If, as a legal and necessary consequence of certain acts, it has ceased to have a corporate existence, and any individual should claim that he thereby has been injured, or that certain benefits result to him, he may, by averring these facts, have his remedy, and need not, in the first instance, institute a proceeding and

have it declared, that its existence has ceased. This, of course, may involve an inquiry into the character of the acts suffered—the burthen being upon the party alleging them—but the fact that its existence has ceased, being established, it becomes dissolved, and may be so treated. See *Philips* v. *Wickham*, 1 Paige Ch., 595, and cases there cited; *Briggs* v. *Penniman*, 8 Cow., 387; *Canal Co.* v. *Railroad Co.*, 4 Gill. & Johns., 1. And, therefore, if, as stated in the bill, the original company has lost its identity and existence, by becoming merged into the new organization, then it may be treated as at an end, for it is in no position to necessarily require a judicial inquiry to determine its existence. It is true, that it may not, and cannot, thus relieve itself, or perhaps the corporators individually, from responsibility to those to whom it or they may be indebted, but it may, by the act, become so situated as to be estopped from claiming that it remains undissolved. *Slee* v. *Bloom*, 19 Johns., 456; 2 Kyd on Corp., 467; *King* v. *Passmore*, 3 Term R., 244; 1 Rolle Abr., 514; Com. Dig., 273."

In the case of *Stone* v. *Framingham*, 109 Mass., 303, the heirs of one Micah Stone brought suit in equity to recover certain property which Stone had bequeathed to the trustees of Framingham Academy for certain charitable uses. Several years after this bequest took effect, the Legislature of Massachusetts passed an act authorizing the trustees of the academy to transfer all their property, including all trust funds, to the inhabitants of the town of Framingham, for the maintenance of a high school. The act was accepted by the trustees and the town, and the trustees conveyed to the town all the property held by them, including the trust funds. The will of Stone provided that if the corporation should ever be dissolved, the principal of the bequest should be divided among his heirs at law, as intestate estate. Complainants claimed that by virtue of the proceedings above mentioned, the trust fund was forfeited by the corporation and reverted to them under the terms of the will. The court held that the corporation was dissolved, and the bequest forfeited. The court, in its opinion delivered by Justice MORTON, said:

"We are inclined to the opinion that these proceedings operated as a dissolution of the corporation for all purposes. But if not, we think it clear that it was dissolved within the meaning in which the testator used that term. If the corporation retains a technical existence, it is practically dissolved, especially

so far as the testator's bequest is concerned. It has permanently ceased to maintain the academy for the benefit of which his bounty was intended. It has surrendered its power to administer the trust fund according to his will, without providing for any successors who can execute the trusts. The purposes for which it was created can no longer be answered, and it has substantially ceased to exist as a corporation. 2 Kyd on Corporations, 467. *Slee* v. *Bloom*, 19 Johns., 456. We are of opinion that it was dissolved within the meaning of the testator, that the bequest has been forfeited, and that the heirs at law can maintain this suit."

The foregoing cases will suffice to show that it is far from true that *Slee* v. *Bloom* "has been rarely, if ever, followed" outside of New York. The fact is, that it has rarely been disapproved, either within or without the State of New York. The only cases which were cited by counsel for appellees, in their brief in the court below, to show disapproval of *Slee* v. *Bloom*, outside of New York, were *Town* v. *Bank of River Raisin*, 2 Douglas (Mich.), 530, *Brandon Iron Company* v. *Gleason*, 24 Vt., 228, and *Hodsdon* v. *Copeland*, 16 Maine, 317.

In the first of these cases, namely, *Town* v. *Bank of River Raisin*, a bank, incorporated under state law, had made an assignment for the benefit of its creditors. A creditor holding bills of the bank, to the amount of $235, filed a bill against the bank, its assignees, and the attorney general, praying for an injunction restraining the bank from further exercising corporate rights, privileges or franchises, and the assignees from all other proceedings under said assignment, and that the assignment might be declared illegal and void, and that the bank might be dissolved and a receiver appointed to take charge of its effects. It was therefore, in effect, a suit brought by a creditor, seeking to have a forfeiture of the franchises of the bank judicially declared, and to have a receiver of its assets appointed. Of course, the court decided that the bill was not maintainable. "The deed of assignment," says the court, "does not indicate, on the part of the corporation, any design to "surrender its franchises or contemplate a dissolution. On the con- "trary, it appears from the deed that the assignment was executed

" on account of the inability of the bank to pay, at that time, its debts " on demand, owing to the difficulty of converting the property and " assets of the bank into cash; and the answer, though it admits that " the bank had suspended the payment of its debts in specie, and " failed to meet its engagements, and had ceased to do banking " business, does not admit that the bank will prove insolvent or be " unable ultimately to pay its creditors." (539.)

So far as the payment of the creditor was concerned, it did not, therefore, appear that the relief sought was necessary. And as to the matter of forfeiture of the charter of the bank, the court simply says that, " By thus failing to fulfil the purposes of its crea- " tion, its franchises may be liable to forfeiture, but this forfeiture " can only take effect after a judgment by a competent judicial " tribunal, under a direct proceeding, instituted for that purpose by " the state, or under its authority and sanction." (540.) That is, the court decided that, so far as the record showed, the liability of the bank to the complainant could and would be as rapidly paid through the assignees as through a receiver, and, so far as the causes of forfeiture of the charter were concerned, they formed no part of the creditor's proper business.

In the second of these cases, namely, *Brandon Iron Company* v. *Gleason*, 24 Vt., 228, the validity of an attachment lien, secured by the Brandon Iron Company upon the property of a debtor, was assailed by another creditor of the same debtor, on the ground that the Brandon Iron Company had become dissolved, by reason of its having for several years ceased to do business, and having disposed of its property and neglected to choose corporate officers. The court decided that the rule laid down in *Slee* v. *Bloom*, was inapplicable. So far from repudiating *Slee* v. *Bloom* the court accurately describes that case as one in which, " for the sake of the " remedy, and in favor of creditors, they will presume a virtual " surrender." (238.) And the court goes on to say:

> " It is probably true that a legal surrender may *be presumed* where, for a sufficient length of time, there has existed an entire non-user of corporate franchises, and a neglect to choose

corporate officers. Such has been the general received doctrine in this state, and was recognized in *Penfield* v. *Skinner*, 11 Vt. Rep., 296. But the lapse of time required for that purpose has never been decided." (238.)

The last of the cases above mentioned, relied upon by appellees to discredit the case of *Slee* v. *Bloom*, namely: *Hodsdon* v. *Copeland*, 16 Me., 314, falls still further short of the mark, as will sufficiently appear from the following language of the court:

"Nor does the doctrine of the case of *Slee* v. *Bloom*, 19 Johns. R., 456, apply to this case. That was the case of a creditor claiming to recover from the private property of the stockholders, payment of debts due from the corporation: and no one of them in his answer alleging the existence of it, the decision was, that the corporation might be considered as dissolved, for the sake of affording the plaintiff a remedy upon their statute. The plaintiff in this case is not a creditor of the corporation, but a shareholder claiming to recover of another shareholder who has taken and sold the corporate property, the value of his shares, or the value of his proportion of the corporate property sold." (317.)

The Supreme court of Maine subsequently decided in *Wiswell* v. *Starr*, 48 Me., 401, and in *Dane* v. *Young*, 61 Me., 160, that the charter of a bank expires by operation of law, when an injunction restraining it from doing business, is made perpetual.

We submit that the considerations stated and the authorities cited in the foregoing pages entitle us to assume that a court of equity will, in certain cases, presume the dissolution of a corporation from acts and omissions of the corporators which show an intention on the part of the corporators to abandon the corporate franchises, and will not permit the corporators to obstruct the suit of an unpaid creditor, by setting up the continued existence of such corporation. This court will not overlook the fact that we do not rely upon mere nonuser of corporate franchises, in the case at bar. The learned judge who delivered the opinion of the court below, does indeed appear to assume that the case made by the bill is limited, in the matter of the dissolution of the vendor corporations, to nonuser of the corporate franchises, and want of corporate assets. He says, referring to the averments of the bill, that "the averment that the

" vendor corporations had distributed their assets among their " stockholders, and ceased to make any use of their franchises, is " not equivalent to an averment of the dissolution of the corpora- " tion. The law is well settled that a corporation is not dissolved " by the non-use of its franchises or by want of assets." (Rec., 136). This is not a full statement of the case stated in the bill. The court seems to class the case at bar with those cases in which it appears that by reason of business misfortunes, a corporation has lost its assets, and has thereby been compelled to suspend its business, but in which the suspension of business has not continued for a sufficient length of time to raise a presumption of intention on the part of the corporators to abandon their corporate franchises, and in which no other act is shown to indicate any such intention.

But the case at bar differs very widely from these cases. The vendor corporations first sold all their property to the complainant corporation, which had been organized for the express purpose of purchasing these properties. Here appeared an obvious intention to retire from the business which they had formerly prosecuted. Having reduced their assets into moneys and securities, the vendor corporations proceeded to distribute all their assets among their stockholders. Here appeared an obvious intention not only to retire from the particular business which they had been prosecuting, but to retire from all business. This unmistakable indication of intention is further fortified by the fact that after such distribution of their assets, they ceased to maintain any corporate organization whatever. We may well apply to this case the language used by Chief Justice Spencer, in the case of *Slee* v. *Bloom*, and say that we " lay out of the case everything of misuser or nonuser, excepting the " influence which the fact of nonuser may have as evidence, con- " nected with other facts, to show the renunciation of the corporate " rights." Taking into consideration the fact that all the acts of the stockholders of the vendor corporations were done freely, of their own motion, and not under stress of any temporary necessity, the complainant seems to us to be clearly entitled to assert, as it does in its bill, that the vendor corporations " abandoned " their franchises

(Rec., 31), and that the defendants are estopped to deny this assertion.

It is scarcely necessary, in this court, to add that if, as between the parties to this proceeding, the vendor corporations are to be treated as dissolved corporations, a court of equity will take jurisdiction of the suit of complainant wherein it seeks to follow assets of the dissolved corporations into the hands of the stockholders who have received such assets. In the case of *Bacon* v. *Robertson*, 18 How., 480, this court said:

> "Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabitities and restrictions, as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust, nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts, out of the moneys so received and in their hands.
>
> "Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale, of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation, as if no such surrender or sale had taken place."

See, also,

Curran v. *State Bank of Arkansas*, 15 How., 304.
Chicago, Rock Island & Pacific Railway Co., v. *Howard*, 7 Wallace, 392.
Broughton v. *City of Pensacola*, 93 U. S., 266.

2. *Assuming that the vendor corporations are still existent, they have parted with all their interest in the assets which complainant seeks to reach, and they are, therefore, not indispensable parties to this suit.*

Even if we must assume that the vendor corporations are so far existent as to be capable of being made parties to the suit, and that, if no jurisdictional difficulty intervened, the court would require them to be made parties, yet the court will not permit the unavoidable absence of these corporations, as parties, to defeat the jurisdiction of the court, unless it shall appear that no decree can be made in this suit without affecting unjustly the interests of those corporations, or without subjecting the defendants who are before the court to some liabilities or risks to which they ought not to be subjected. Under the provisions of Equity Rule 47, and of Section 737 of the Revised Statutes of the United States, federal courts of equity dispense with the presence of parties who cannot be brought before the court in many cases in which, under the practice of state courts, such parties would be considered necessary parties to the suit, and in which federal courts themselves would require the parties to be brought in if it were possible to do so without ousting the jurisdiction of the court.

Indispensable parties are described by this court in *Shields* v. *Barrow*, 17 How., 130, as "persons who not only have an interest "in the controversy, but an interest of such a nature that a final "decree cannot be made without either affecting that interest or "leaving the controversy in such a condition that its final determ-"ination may be wholly inconsistent with equity and good con-"science."

See, also, *Barney* v. *Baltimore City*, 6 Wall., 284.
Williams v. *Bankhead*, 19 Wall., 563.

Do the vendor corporations fall within the category thus described?

The bill alleges that after the sale of their properties to complainant, the vendor corporations distributed all their assets among

their stockholders, "and the same were received by said share-"holders." As between the corporations and their stockholders, the assets so distributed ceased to be corporate assets. No action would lie in favor of the corporations against the stockholders, to recover these assets. A decree in favor of complainant against the defendant stockholders, requiring payment of complainant's claim out of distributed assets, could not, therefore, in any way affect any interest of the vendor corporations. The bill alleges that complainant is the only unpaid creditor of the vendor corporations, and consequently the defendant stockholders will not be exposed to the danger of further claims, in respect of the distributed assets. The presence of the vendor corporations in this suit is not therefore indispensable, either to their own protection, or to the protection of the defendants.

Neither of these propositions can be seriously controverted. Some amplification may, however, not be superfluous.

First, then, as between the vendor corporations and their stockholders, the corporations have no interest in, or claim to, the distributed assets. Upon the formation of the vendor corporations, a contract was formed between their several stockholders, that a certain amount of capital should be contributed by each for the prosecution of the business of the corporation, for a period of specified duration. It was competent, however, for the stockholders by unanimous consent to rescind this contract between themselves, and distribute the capital so contributed, before the expiration of the specified period; and it appears that the stockholders did rescind this contract, and distribute the assets. While the corporate franchises might survive the rescission of the contract between the corporations—that is, while the privilege derived from the state might still inhere in the respective members of the corporations to re-organize and rehabilitate the corporations, the rescinded contract between the corporators to contribute capital to the enterprise could not be restored or renewed, except by the unanimous consent of all the shareholders.

"While a corporation which has wound up its business is not dissolved in legal contemplation, it would ordinarily not have a right to begin the business of the company anew, as this would be a departure from the company's charter. If the majority should attempt to do so, a dissenting shareholder would ordinarily have a right to restrain them." Morawetz, 2d Ed., Sec. 1,008, Note 1.

In the case of *The Bank of Ft. Madison* v. *Alden et al.*, 129 U. S., 372, an attempt was made by certain stockholders of a corporation who were also creditors at large of the corporation, to reach assets of the corporation which had been distributed by agreement of the stockholders amongst themselves, to which distribution the complainant stockholders had consented under a misapprehension as to the sufficiency of certain other assets to meet their claims. The court holds that under such circumstances the assets distributed could not be recalled at the suit of a consenting stockholder, even though such stockholder were an admitted creditor. The court says:

"But assuming this to be the correct doctrine so far as any alleged difference between the subscription and the value of the property taken in payment is concerned, it is contended that the lands, which in the hands of the trustee constituted a trust fund for the benefit of the stockholders and creditors of the company, were not divested of their trust character upon their reconveyance to the stockholders, that the only effect of the reconveyance was to substitute several trustees in place of one, and that the appellant has, therefore, a right to proceed against either or all of them for an accounting. If this were a suit by a creditor other than a stockholder, there would be great force in this position of the appellant. It might be well contended that a conveyance of the trust fund to the stockholders upon their resolution could not deprive a creditor, not consenting thereto, of his right to compel the application of that fund to the payment of his demand, or of a ratable proportion with other creditors. But the right to compel such application cannot be invoked by a stockholder consenting to such disposition of the trust fund, and himself participating in its appropriation, as in the present case."

And in general it may be said that any disposition which a private trading corporation, enjoying no public franchise and therefore having no specific duties to perform to the public, may see fit to

make of its capital, with the concurrence of all its stockholders, is valid and unimpeachable by any one, unless such corporation shall, at the time of such disposition, be insolvent, or shall become insolvent by reason of such disposition, and in case of insolvency such disposition can be inquired into only by the creditors of the company.

In the case of *Graham* v. *Railroad Company*, 102 U. S., 148, this court decided that even a creditor of a corporation could not call in question the disposition which the corporation may have made of its assets before the corporation became indebted to the creditor.

And in *Scovill* v. *Thayer*, 105 U. S., 143, this court applied the same principle to the case of an agreement between a company and its stockholders, whereby stock was issued to the stockholders as full-paid stock, which in fact was not full paid. Though the court held that such an agreement was a fraud upon creditors of the company and could be set aside by them, it was perfectly valid as between the company and its stockholders.

This being the established rule, it is clear that no decree which the court could enter upon the bill in the case at bar could affect the rights of the vendor corporations in any way.

We pass, then, to the second inquiry, namely: does the proper protection of the defendants themselves require the presence of the vendor corporations in this proceeding? Two reasons were urged by counsel for defendants in the court below in support of an affirmative answer to this question, namely: that unless the vendor corporations were parties to the proceeding, the defendants might again be subjected to litigation in respect of the same properties; and that, in any event, the claim upon which the complainant bases its action is a claim against the vendor corporations, and that the burden of defending the action ought not to be cast upon these defendants. We have already disposed of the first of these reasons by showing that the corporation itself can maintain no action against these defendants, and that, as the bill alleges that complainant is the only unpaid creditor of the vendor corporations, these defendants cannot be sub-

jected to any further litigation by or on behalf of other creditors of the vendor corporations.

At first thought their second reason has an appearance of plausibility, and we concede that if the vendor corporations (supposing they had some real vitality left in them) could be made parties to the proceeding, the court would require them to be brought in to defend the action. But this is by no means decisive of the question. The vendor corporations are Wyoming corporations. The defendants are citizens of Illinois. There is no single tribunal, federal or state, which can issue valid compulsory process against all of these parties. In effect, therefore, the claim of defendants, which we are now considering, resolves itself into a claim that complainant must first obtain judgment against the vendor corporations before calling upon defendants to account. So far as this claim raises the question of the standing of complainant in a court of equity as a creditor at large, we shall have occasion to consider it under the second division of this argument. At present we are concerned with it only as affecting the question of parties.

Now the question of parties, as presented by this demurrer, is purely a question of convenience. And whose convenience has the strongest claim upon the consideration of this court? The defendants have brought the burden of this defense upon themselves. If they had not, by their own act, and for their own personal profit, stripped the vendor corporations of all their means, without making any provision to meet the obligations which they knew those corporations had assumed in their contract of sale to complainant, these defendants would not now be called upon to assume the burden of this defense. These defendants, having taken to themselves the possession and enjoyment of all the substance of the vendors, should be held in equity to have assumed all the obligations to which the vendors could otherwise have been compelled to respond.

And the alleged inconvenience is itself very largely a pretense. Corporations must defend actions by their officers or trustees. An examination of the contract of sale set out in the bill (Rec., 5 11)

shows that the defendants who appeared in this suit and demurred to the bill, included all of the persons who were trustees of the several vendor corporations at the time of the sale to complainant, excepting Alexander H. and Thomas Swan, Hicks and Thomasson. Every defense which would be available to these defendants, or to the vendor corporations, if those corporations were parties to this suit, is available to these defendants as the suit now stands. As the vendor corporations have not a dollar in their treasuries, the entire expense of the defense would, in any event, have to be borne by the stockholders. And as to the right of each stockholder to compel his fellow-stockholders to contribute their share of the expense of the litigation,and of any amount which defendant may recover in the suit, this defendant cannot be hindered or delayed in its remedy while the stockholders adjust their respective rights among themselves. *Hatch* v. *Dana*, 101 U. S., 205.

Bearing in mind then the two distinguishing features of the case at bar, namely; that the vendor corporations have parted absolutely with all their interest in the funds in controversy, and that complainant is the only unpaid creditor of the vendor corporations, let us see to what extent the cases cited in the opinion of the court below (Rec. 140) support the conclusion reached by that court on the question of parties.

In the case of *Kendig* v. *Dean*, 97 U. S., 423, the complainant claimed to be owner of certain shares of stock in a corporation which shares stood in the name of the defendant. Complainant sought by his bill to compel defendant to cause the stock to be transfered to complainant on the books of the company. The company was not a party to this suit, and this court held that in the absence of the company, the court had no power to compel the transfer to be made on the books of the company, and directed that the bill be dismissed without prejudice. This case shows neither of the distinguishing features of the case at bar.

In the case of *Wood* v. *Dummer*, 3 Mason, 308, Justice Story did state that to a bill brought by creditors of a bank, seeking satisfaction of their claims out of capital of the bank distributed among

the stockholders of the bank as dividends, the bank itself would have been a necessary party, if it had not ceased to exist. There would appear to have been no jurisdictional difficulty in the way of making the bank a party in that suit, and the case is not, therefore, direct authority for the proposition that a corporation is in such case an indispensible party to the suit, especially in view of the fact that equity rule 47 was not adopted, and section 737 of the revised statues was not passed, until long after this case was decided. Moreover, the point does not appear to have been made, in that case, that the corporation had no interest in the funds in controversy. The court speaks of the funds as still the funds of the bank—"its funds are to be applied in payment of debts." (316.) What the court evidently had in mind was, the fact that in that case, as appears from the opinion, there were numerous unpaid creditors who were not before the court, (321–322) who might subsequently have a receiver of the bank appointed, and that such receiver might sue these stockholders to recover the same funds.

In the case of *Lyman* v. *Bonney*, 101 Mass., 562, the complainant, being a creditor of an insurance company, filed a bill against certain officers of the insurance company, to whom the company had paid certain moneys in trust, to pay complainant's claim, which claim these officers had failed to pay. The insurance company was not made a party, and on demurrer the court held that the company was a necessary party. But the decision is based expressly upon the ground that "the funds which are alleged to have been mis-"appropriated were the funds of the corporation; and the action of "the defendants, which is alleged to have been wrongful, was pro-"fessedly as officers of the corporation." The funds in controversy had not, in that case, ceased to be the funds of the corporation by the delivery thereof to the defendants in trust for a specific purpose. Nor did it appear in that case that the insurance company had no other funds out of which the debt might have been paid. Nor was there any jurisdictional difficulty in the case in the way of making the insurance company a party. It is true that in the subsequent case of the *Inhabitants of Deerfield* v. *Nims*, 110 Mass., 115, which

was decided upon the authority of *Lyman* v. *Bonney*, the property sought to be reached was corporate property, improperly divided amongst the stockholders, and for which the corporation, it would seem, could not have maintained an action. But the corporation in this case was within the jurisdiction of the court, and could have been made a party; and it did not appear that there were no other creditors who might, through the instrumentality of a receiver, prosecute other suits to recover the same property.

In the case of *Patterson* v. *Lynde*, 112 Ill., 196 (erroneously printed on page 140 of the record as "*Patterson* v. *V. Lyndem*") a bill was filed by a creditor of an Oregon corporation against certain stockholders of that corporation, who were citizens of Illinois. The bill alleged that complainant had obtained a judgment against the corporation in Oregon, and that defendants were indebted to the corporation for unpaid stock subscription. Complainant sought to enforce the payment of those unpaid subscriptions, and to apply the amount collected upon his judgment. The court held that under the statutes of Oregon, and the decisions of the Supreme court of that state, it was necessary that an equitable proceeding be instituted in Oregon, wherein the rights of all the creditors and of the stockholders could be adjusted before any proceeding could be maintained in Illinois for the collection of these unpaid stock subscriptions. But in this case, again, the very gist of the decision is, that the debt which complainant sought to compel defendants to pay was a debt to the corporation for which the company itself might have maintained an action, and could have been compelled to institute an action.

In the last case cited in the opinion of the court below, namely: *First National Bank* v. *Smith*, 6 Fed. R., 215, Judge NELSON tersely states the case, his decision, and his reasons therefor, as follows:

> "The plaintiff's bills, as amended, pray in substance that the defendants may be required to account for unpaid subscriptions to stock and dividends, received out of capital as assets of the insolvent corporations, and that these assets may be applied in payment of certain judgments which the plaintiff

has recovered against the corporations. It is too clear to admit of discussion that the corporations are necessary parties to suits like these. Unless they are made parties, they will not be concluded by decrees made in the cases on the merits, and the defendants might be called upon a second time to account for the same assets at the suit of the corporations, or receivers appointed over their affairs.

The defendants have the right to insist that the decree shall conclude the plaintiffs, the corporations, and all other creditors, and afford a full and complete protection against future suits for the same causes of action."

In two other cases decided by Circuit courts of the United States, and relied upon by counsel for defendants in the court below, namely: *Dormitzer* v. *The Illinois & St. Louis Bridge Company*, 6 Fed. R., 217, (decided by Judge Lowell), and *Walsh* v. *Railroad Company*, 6 Fed. R., 797, (decided by Judge McCrary), the same reasons which were stated by Judge Nelson were applicable and were applied. In both cases the action was brought to recover funds which belonged, or were assumed to belong to the corporations, and the corporations were held to be indispensable parties.

It is not possible for us to examine in this brief all, or even a considerable number, of the numerous cases cited by counsel for defendants in their brief in the court below, without enlarging this argument beyond permissible proportions. We would simply state generally, that an examination of those cases will show, either that there were in those cases no jurisdictional obstacles to the bringing in of the corporations as parties, or that the funds sought to be reached were funds for which the corporations themselves could have maintained actions in their own name, or that it did not appear that there were no other creditors at whose suits receivers might be appointed, who would institute other suits on behalf of other creditors.

Even when the funds sought to be reached were unpaid stock subscriptions, Federal courts have not always considered the corporations indispensable parties to suits brought by creditors to enforce payment of such subscriptions. In *Walser* v. *Seligman*, 13 Fed. Rep., 14, the complainants were creditors and stockholders of

a certain railroad company, organized under the laws of Missouri and Kansas, and filed a bill in the Circuit court of the United States, for the Southern district of New York, on behalf of themselves and all other creditors and stockholders who might desire to join, to enforce a liability of the defendants, who appear to have been citizens of New York, as holders of sixty thousand shares of unpaid capital stock of the corporation.

> "The corporation," said Judge WALLACE, in his opinion, "is not made a party to the suit, but its presence can be dispensed with, and adequate relief granted in its absence, as it has not such an interest in the subject of the suit that a decree without prejudice to its rights cannot be made. Sufficient reasons for not making it a party are found in the fact that it is beyond the jurisdiction of this court, and also in the fact that it is practically defunct."

In the case of *Wellman et al.* v. *Howland Coal & Iron Works*, 19 Fed. Rep., 51, the bill alleged that "The Howland Coal and Iron "Works is now, and has been for several years insolvent, its entire "property and franchises having been sold out several years ago, "and the said corporation has long since ceased to do business, and "has no officers, or agents or office in this state, and has had none "for three years or more last past." A creditor, apparently, a creditor at large, filed a bill against a stockholder of the corporation to reach unpaid stock subscriptions to the company's stock. The suit was removed from the state court to the federal court; a motion to remand was made upon the ground that the corporation was a necessary party to the suit, and that as the complainant and the corporation were both citizens of the same district (District of Kentucky), the federal court could not entertain jurisdiction. In denying the motion to remand, Judge BARR said:

> "The allegations of the pleadings and exhibits then and now in the record, show that all the visible property of this corporation had been sold, also its franchises, except the right to exist as a corporation. The corporation still had a legal existence but not an actual one. It had no organization, no officers or agents, but the stockholders still had the right to reorganize and elect officers. If this were done, the corporation could sue and be sued, and it could collect the unpaid stock subscription and

apply it to the payment of the debts of the company. * * * While, therefore, this corporation is not defunct, it has no living active existence, although in law it may survive sufficiently to have the power of reorganization for some purposes. Its present status makes the reasons which apply to a defunct corporation apply to this one. The Howland Coal and Iron Works is only a nominal party, if a party at all."

In the last two cases cited. the corporations were held not to be indispensable parties, partly because they were practically defunct, though not actually dissolved. The same ground was taken by Judge WALLACE in another case involving a different state of fact, namely: *Ervin* v. *Oregon Railway and Navigation Company*, 20 Fed. Rep., 517. In that case "the property and franchises" of the Oregon Steam Navigation Company had been sold to the Oregon Railway and Navigation Company, and the proceeds of sale had been distributed among the stockholders of the former company. The bill was filed by a dissenting minority of stockholders,and alleged that the sale had been made at a grossly inadequate price, and prayed that the purchaser be decreed to hold the property as trustee for complainants, and that defendants be compelled to account to the complainants for the fair value of the property. The bill was demurred to because the corporation, the Oregon Steam Navigation Company, being an Oregon corporation, was not a party to the suit. In overruling the demurrer, Judge WALLACE, said: "There does not seem to be "any good reason why the Oregon Steam Navigation Company "should be deemed an indispensable party. It is not a going con- "cern. If the sale of the property should be set aside, the corpo- "ration would be only a dry trustee, for the purpose of dividing "the property among the beneficial owners."

It is true that the majority of the stockholders of the vendor corporation had proceeded, under the statute of Oregon, to a pretended dissolution of that corporation, but the court does not base its conclusion upon that fact. On the contrary, the court in the language above quoted, assumes that the corporation still had a legal existence, though dormant, and it further adds: "Although "the corporation may not be effectually extinguished as against

" creditors, there is no difficulty in concluding that it is so far ex-
" tinct that it cannot stand in the way of the enforcement by its
" former stockholders of their equitable rights to a fair ac-
" counting from those who have assumed to distribute its assets."

Even State Courts, which are not embarrassed by the jurisdictional limitations which embarrass Federal courts, have, in some cases, not scrupled to dispense with the presence of corporations in suits brought by creditors to reach corporate assets which have been distributed among stockholders in disregard of the rights of creditors.

The case of the *Appeal of Stang*, 10 Weekly Notes of Cases, 409 (decided by the Supreme court of Pennsylvania in 1881), is, so far as the facts of the case are concerned, strikingly similar to the case at bar. In that case all the property of the Western Market Company had been sold, and the proceeds had been distributed by the stockholders of the company amongst themselves. Complainant, who was the only remaining unpaid creditor of the company (page 413), filed his bill against certain stockholders of the company to compel payment of his claim out of the assets of the company received by them. The Western Market Company, though it was a Pennsylvania corporation, and, therefore, within the jurisdiction, was not made party to the suit.

> " After the sustaining of a demurrer on the ground that the market company had not been joined, the complainant amended his bill by an averment that the corporation had ceased to act as such, and prayed that as its former officers were parties defendant the service, which had been upon them individually, should be decreed a service upon the corporation. Upon this prayer no order of the court appears of record." (Page 410.)

The case was referred to an examiner and master, upon whose elaborate report as to the facts and as to the law applicable to the facts, the court briefly decides :

> " We think in a proceeding of this nature it was not necessary that all the stockholders should be made parties, and as to the market company the not making of it a party is sufficiently excused by the amendment. If the appellants were not satis-

fied with that excuse, they should have demurred to the bill. We affirm this decree upon the report of the learned master in the court below." (414.)

From the lengthy report of the case of the *Silver Valley Mining Company* v. *The Baltimore Gold and Silver Mining and Smelting Company*, 99 N. C., 445, it appears that the Silver Valley Mining Company and the Baltimore Gold and Silver Mining and Smelting Company were both North Carolina corporations; that the Baltimore Gold and Silver Mining and Smelting Company *of Baltimore City* was a Maryland corporation; that the complainant, the Silver Valley Mining Company, had been induced by the fraud of the Maryland corporation to transfer to certain trustees a large amount of property and shares of stock to secure an alleged debt due from complainant to the Maryland corporation; that the Maryland corporation, after getting possession of and appropriating the stock, transferred all its property to the defendant, the Baltimore Gold and Silver Mining and Smelting Company; that thereafter the stockholders of the Maryland corporation abandoned the corporate organization; that the complainant thereafter filed a bill against the trustees under the trust deed and against the defendant, the Baltimore Gold and Silver Mining and Smelting Company seeking a cancellation of the trust deed and an account of the proceeds of the shares of stock. The Maryland corporation, being out of the jurisdiction of the court, was not made party to the suit. Upon objection being made for the want of parties, the court, holding that the objection was invalid, says:

> "It was insisted below that the Maryland corporation was a necessary party; as it was alleged in the complaint, and the whole pleadings and evidence went to show that the deed of trust in question was made to secure a large debt therein specified due from the plaintiff to it, and also that it fraudulently got the shares of the capital stock mentioned, sold the same and realized therefor the sum of ninety thousand dollars, etc. As to the deed of trust the trustees therein having the legal title to the lands are parties defendant and making defense, and in a measure and in an important sense represent the *cestuis que trustent*. This corporation is a non-resident and not within the jurisdiction of the court. Besides, it appears that its stock-

holders have dissolved and abandoned it, as far as they could do so without a formal surrender of its charter; that it has assigned all its property, rights, credits and effects of every kind whatsoever to the defendant corporation, and has, as far as it could, merged itself in the defendant corporation, which latter has assumed to represent it and likewise all its liabilities."

In the case of an ordinary creditor's bill, invoking the exercise of the auxiliary jurisdiction of a court of equity, to set aside a conveyance made by a debtor in fraud of the rights of his creditors, the rule is, that, "If the property has been transferred merely as security for a debt, the debtor is a necessary party. If he has parted with the title absolutely he is a proper party, for it is his debt that is sought to be collected, and his fraudulent conduct that requires investigation. But he is not a necessary party, for he has no beneficial interest which can be affected by the litigation." Bump on Fraudulent Conveyances, 3d Ed., 548.

In some state courts a different rule prevails, but the rule as above stated was recognized and applied by this court in the case of *Buffington* v. *Harvey*, 95 U. S., 99. In that case the bill was filed by an assignee in bankruptcy, to set aside a conveyance made by his assignor in fraud of his creditors, and it was held that the assignor was not a necessary party. While the case at bar is not, in our opinion, as we shall hereafter state more particularly, simply an ordinary creditor's bill, invoking the auxiliary jurisdiction of a court of equity, there is certainly no apparent reason why the court should apply any more stringent rule as to parties, in cases like the case at bar, than it applies in case of ordinary creditors' bills.

II.

CAN COMPLAINANT MAINTAIN THIS SUIT AS A CREDITOR-AT-LARGE OF THE VENDOR CORPORATIONS?

If this court shall be of opinion that the acts of the vendor corporations and of their stockholders, at the time of and following the sale of the properties to complainant, amounted to a surrender of the corporate franchises of the corporations, and that they are

therefore, for all practical purposes dissolved, then this suit is certainly maintainable; for it is no longer open to question that a creditor-at-large of a dissolved corporation can maintain a bill in equity to reach its assets.

Wood v. *Dummer*, 3 Mason, 308.
Howe v. *Robinson*, 20 Florida, 352.

But, if we are to assume that the vendor corporations still exist as legal entities, and that valid service of process could be made upon them, and a valid judgment at law could be entered against them, then it becomes necessary to inquire whether in the state of facts disclosed by the bill, complainant has a right to come into equity in the first instance, without first obtaining judgment at law against the vendor corporations.

In the court below we based the right of complainant to come into equity in the first instance mainly upon the futility of any possible proceeding at law, and not upon the character of the funds in controversy as trust funds, over the distribution of which a court of equity would have original jurisdiction. We shall pursue the same course in this court. That the assets of an insolvent corporation are a trust fund is, however, no longer open to question in this court. Doubt arises only when the inquiry extends to the consequences, in the way of rights and remedies of creditors, which naturally follow from the character of the fund.

A vast array of cases can be cited in which the jurisdiction of equity over these so-called trust funds is practically narrowed down to the ordinary auxiliary jurisdiction of equity to aid a creditor who has already obtained a judgment lien upon the property of his debtor. The auxiliary jurisdiction of equity can be invoked by a judgment creditor of an individual who has failed to get satisfaction of his judgment. But property of an individual debtor, whether solvent or insolvent, is not, as such, a trust fund in any sense whatever. The denial, therefore, of any other or further right or remedy to the creditors of an insolvent corporation than such as the creditors of an individual have long enjoyed, operates to pare down

the trust character of the assets of an insolvent corporation to the point of practical invisibility.

If the assets of an insolvent corporation are a trust fund in any substantial sense, they are a trust fund of which a court of equity should take jurisdiction to administer when all of the creditors of the corporation are in court, whether any of the creditors are judgment creditors or not. This complainant is admitted to be the only unpaid creditor of the vendor corporations, and it is impossible to see why, as between the parties before this court, the equities in favor of an administration of the trust fund are not as strong as they would be if the creditors were numerous. Especially should a court of equity take jurisdiction of the administration of such a fund when it appears, as in the case at bar, that the fund itself has by reason of fraudulent conveyances been placed beyond the reach of any process of a court of law—that is when the fund is one which a court of equity only can ultimately uncover and make available for the payment of the claims of the creditor.

We do not consider it necessary, however, further to continue so wide a controversy as this view of the case would necessarily open; and we proceed therefore with the more modest undertaking of showing that in the state of affairs disclosed by the bill, a judgment at law would be effectual for no purpose whatever but to increase expense and delay, and that in such a case a creditor is not required to reduce his claim to judgment before invoking the aid of a court of equity.

We have already said so much in the foregoing pages of this brief concerning the condition of utter destitution to which the vendor corporations were reduced by the acts of the defendants and other members of the corporations, that we need now say nothing more than this, that the vendor corporations not only have no property whatever, but they have themselves no capacity legally to compel the restitution of any part of the property which was once their own, or to acquire any other property in any other way than by sheer gift. The chance of charity is not one which a court of equity

will compel a creditor to take, still less to pay for either with time or money.

Does then the fact that judgment at law would in this case necessarily be fruitless, entitle complainant to ask the aid of equity in the first instance? The answer to this question in this court cannot be considered doubtful.

In the case of *Case* v. *Beauregaurd*, 101 U. S., 688, Mr. Justice STRONG, in delivering the opinion of this court, said:

> "It is, no doubt, generally true that a creditor's bill, to subject his debtor's interests in property to the payment of the debt, must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment had been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is, that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary; or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one, that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he had done all that he could do at law to obtain his rights.
>
> "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, '*Bona sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary pre-requisite to equitable interference. *Turner* v. *Adams*, 46 Mo., 95; *Postlewait* v. *Howes*, 3 Iowa, 365; *Bk.* v. *Harvey*, 16 Iowa, 141; *Botsford* v. *Beers*, 11 Conn., 369; *Payne* v. *Sheldon*, 63 Barb., 169. This is certainly true where the creditor has a lien or a trust in his favor."

The case from which we have quoted affords an interesting illustration of the concurrence of the two elements which we have just

alluded to, namely: the futility of proceedings at law, and the claim of an equitable lien upon equitable assets. The controversy between the parties in that suit had the attention of this court on two occasions. On the first occasion (*Case* v. *Beauregard*, 99 U. S., 119) the bill was filed by creditors of an insolvent partnership making the members of the copartnership together with the transferees of the partnership property, parties defendant to the bill. The object of the bill was to follow and subject to the payment of a partnership debt, property which formerly belonged to the partnership but which, before the bill was filed, had been transferred to certain of the defendants. It was found, as a matter of fact, that the partnership assets had passed out of the hands of the members of the firm and into the hands of *bona fide* holders before the action was commenced, and, therefore, that as a matter of law the *quasi* lien of the partnership creditors upon the partnership assets, was lost.

Some incidental observations of the judge who rendered the decision with regard to the rights of complainants as creditors at large, appear to have led the complainants to believe that as judgment creditors they might be able to obtain relief which was then denied to them as creditors at large. Accordingly, after the termination of the first suit, they obtained judgment against the members of the insolvent firm, and filed another bill against the same parties seeking the same relief. But the decree in the former suit was held to be a bar to the maintenance of the second suit. To reach this conclusion, it was necessary to find that the case made by the bill, in the first suit, was a case of equitable cognizance, and the court finds this to have been the fact. After stating the general principle applicable to the case in the words which we have quoted, Mr. Justice STRONG proceeds to define the two elements in the first suit, which made it a proper case for the interference of a court of equity, if the equitable lien asserted had not been lost:

> "The bill in that case asserted, in the most ample terms, the remedilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged to the railroad company, each of the members of the partnership was largely indebted, with-

out means, and in a state of insolvency, and that they had since been and still were insolvent; so that a suit at law and the recovery of a judgment against them or either of them, would not afford the complainant any relief because neither of the partners have, or had, since the dates of these pretended transfers of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the bank. What more could have been necessary to show that the complainant had no remedy at law; that his remedy, if he had any, was in equity?

"But this was not all. The bill charged that the conveyances of the partnership property and the transfers by which it had been vested in the railroad company, were illegal and fraudulent; that the bank had a privilege or lien upon the property; and it prayed that the various acts of sale, transfer and conveyance by which the property that had belonged to the partnership had been conveyed to the railroad company, should be declared null and void, and that the property should be decreed to be liable to the payment of the amount due to the bank.

"Thus it appears the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case."

In the case of *Hibernia Insurance Co.* v. *St. Louis & New Orleans Transportation Company*, which came successively before Judges Treat and McCrary, and is reported in 10 Fed. R., 596, 13 Fed. R., 516, and 17 Fed. R., 478, the principles stated in *Case* v. *Beauregard*, were regarded as justifying the maintenance of the bill by a creditor at large, of a debtor corporation against the transferee, with notice, of all the assets of the debtor corporation for the satisfaction of the creditor's claim out of the assets so transferred.

In the case at bar, the assets have been transferred without any consideration, and *mala fide*, the distributing vendor corporations having notice, as is alleged by the bill (Rec., 29), of their indebtedness to the complainant.

There are few questions upon which authorities can be consulted with less satisfaction than the question now under consideration. The cause of this is, that the statutes of so many of the states of the Union contain certain provisions prescribing the conditions upon which resort may be had by creditors of a corporation to its stockholders. These conditions are often tacitly assumed in the opinions

of the courts, and it is thus often difficult to ascertain the real ground upon which any given decision is based, without an examination of the statutes which govern the case. This court, for example, in the case of *Taylor* v. *Bowker*, 111, U. S. 110, held that a creditor of a corporation who had obtained judgment against the corporation, but had no execution upon the judgment, could not maintain a bill against certain distributees of some of the assets of the corporation for the satisfaction of his claim out of such assets. But it appears from the opinion of the court that the case was one governed by the laws of the State of Maine, and the decision is expressly based upon the requirements of the statutes of the State of Maine, as interpreted by the Supreme Judicial Court of that State. On the other hand, in the case of *Sage* v. *Memphis, etc., Railroad Company*, 125 U. S., 361, 376, it was held that the return of execution unsatisfied was not necessary to the maintenance of a bill for the appointment of a receiver of a corporation, inasmuch as the "suing out an execution would, according to the facts and the "admission of the parties, have been an idle ceremony, causing "useless expense, and bringing no real benefit to the plaintiff."

The Supreme Court of Oregon, in the case of *Hodges* v. *The Silver Hill Mining Co.*, 9 Ore., 200, very well expressed the unsatisfactory character of the cases decided by the various state courts, when regarded as authority on the question now under consideration. In that case the court said :

> "This is a suit in equity to fix the liability and recover the amount of a certain indebtedness against the stockholders of the above named corporation. The allegations of insolvency and the amount of capital stock subscribed and unpaid are not denied, and, of course, stand admitted. * * *
>
> Before proceeding to pass upon the question submitted by the appellants it becomes necessary to notice an objection of the respondent to the sufficiency of the complaint. The objection is that a suit cannot be maintained against the stockholders of a corporation until a judgment has been obtained against the corporation and an execution issued and returned *nulla bona*. This is the general rule and ordinarily to be pursued, but it is subject to some modifications. With but one exception all the authorities cited to sustain that proposition are

from those states where statutes have made such a proceeding a prerequisite before the liability of the stockholders can be enforced. But an examination of some of them will, at least, show instances in which the condition of the corporation, such as dissolution or insolvency, render this proceeding to judgment and return of execution *nulla bona* unnecessary. We have no legislation in respect to this matter.

'A judgment and execution unsatisfied are evidence of insolvency, of inability to collect. They are, however, evidence *only* and the fact may be established as well by other evidence; among other modes by an assignment and continued suspension of business or other notorious indications (92 U. S. R., 161, and authorities cited).

'Judgment and execution returned *nulla bona* only constitute one kind of proof of insolvency, although the proof may be declared to be sufficient by statute, it does not exclude other methods.' (Thompson on the Liability of Stockholders, Secs. 320 and 321.)

All that certainly can be said is that the return of *nulla bona* is the best evidence of insolvency and the failure to pursue this course may be supplied by other proof that the principal is notoriously unable to pay his debts. (2 American Leading Cases, and authorities cited.)

The law does not require useless things, and we are at a loss to concieve what possible object could be accomplished by bringing a suit against an insolvent corporation, except for the purpose of accumulating costs and increasing the burdens of the stockholders. Admitted to be an insolvent corporation and without any assets or property whatever, it seems to us that the mere bringing of a suit would be idle, vain, fruitless and unnecessary. As was said by Chancellor KENT, in *Trustees of Huntington* v. *Nicoll*, 3 Johns., 566: 'It is one of the maxims of the common law and which is a dictate of common sense that the law will not attempt to do an act which is vain, or to enforce an act which would be frivolous.'"

And in the case of the *State Savings Association of St. Louis* v. *Kellogg*, 52 Mo., 583, which we have hitherto cited upon the point of the dissolution of the vendor corporations (*supra*, 25–26) the Supreme court of Missouri did not even permit a too narrow interpretation of a statute of that state to prevent the maintenance of an action by a creditor at large. The statute of Missouri under which the action was brought, provided that no stockholder should be

personally liable for the payment of any debt contracted by the company, unless a suit for the collection of such debt had been brought against such company, within one year after the debt had become due. In disposing of this defense, the court said:

> "The law does not require useless things, and what possible good could have been accomplished by bringing suit against the company? It would only have been accumulating costs for the plaintiff to pay in addition to its failure to obtain any satisfaction.
>
> Before the debt was sixty days old, the company was decreed a bankrupt. It had no assets whatever, it would have been an idle ceremony—a useless form—to have proved up the claim in the bankrupt court, for the estate was totally without funds or means of any kind. The statute plainly refers to ordinary actions where there is a subsisting corporation. But, here, before the limitation had expired, the corporation was dissolved. The mere bringing of a suit under such a state of facts, would have been idle, vain and fruitless. Says Kent, Ch., in *Trustees of Huntington* v. *Nicoll*, 3 Johns., 566–598: 'It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous.'
>
> The facts in this case surely take it out of the dry letter of the law, and furnish a remedy within its spirit and meaning. A literal compliance would have been wholly futile, and the reason for not proceeding I think is good, legal and sufficient."

To the same effect is the case of the *Sprague-Brimmer Manufacturing Company* v. *M. J. Murphy Furnishing Goods Company*, 26 Fed. Rep. 572, in the Circuit court of the United States, for the Eastern District of Missouri.

Cook on Stock and Stockholders, after stating the general rule on this subject, adds:

> "When, however a corporation has been adjudged a bankrupt and a dissolution has in this way been brought about, the remedy against the corporation need not first be exhausted. Such, also, has been held to be the rule where the corporation is notoriously insolvent, or is formally dissolved." (2d Ed., Sec. 200.)

And again, it will not escape the notice of this court that when a creditor at large of a corporation files his bill to obtain satisfaction

of his debt out of unpaid stock subscriptions, or out of property of the corporation in the possession of the stockholders, but belonging to the corporation, the allegation of the bill, that complainant is without remedy at law, cannot be said to be entirely free from all taint of suspicion. For, although the corporation be destitute of any visible assets in its actual possession, it does not follow that it would not, in case judgment had been obtained against it at law, perform its duty by reducing to possession the assets which are really its own. At least the corporation could be compelled to do so.

And yet more important is the consideration that in such case there is no fraudulent conveyance or disposition of the assets of the corporation which necessarily has to be set aside before either the corporation or the creditor can make the assets available for the satisfaction of the debts of the corporation; that is, the assets are, in such case, not purely equitable assets. When this consideration is borne in mind, such cases as *Walser* v. *Seligman*, 13 Fed. R., 415, which counsel for defendants urged very strongly in the court below, and in which a creditor sought to reach unpaid stock subscriptions, cease to have much force as authority in the case at bar.

A complainant more utterly remediless at law than the complainant now at the bar of this court could not well be imagined, and if the principles enunciated by this court in *Case* v. *Beauregard*, *supra*, be applied to the facts of the case at bar, we can see no escape from the conclusion that this suit is maintainable by complainant as a creditor at large of the vendor corporations.

Although the defendants have demurred generally to the bill, the only specific objections to the bill which were discussed in the court below or which were passed upon by that court, were the alleged defect in parties, and the fact that complainant had not exhausted its remedy at law, and we presume that these points will be the only ones which counsel for appellees will contest in this court; and we do not therefore deem it necessary to discuss in this argument any other questions.

Respectfully submitted.

WILLIAM H. SWIFT,
Solicitor for Appellant.

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IN THE

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OCTOBER TERM, A. D. 1892.

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BRIEF AND ARGUMENT FOR APPELLEES.

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BRIEF AND ARGUMENT FOR APPELLEES.

THIS IS an appeal from a decree of the Circuit court of the United States for the Northern district of Illinois. The suit was by bill in equity, and was heard upon demurrer, which was sustained, and thereupon the bill was dismissed. The contents of the bill are well enough stated in appellant's brief. We have also on pages 7 and 8 of that brief the allegations of the bill in full, upon which the questions presented by this appeal arise, and also on pages 9 and 10, the objections to the bill assigned in the demurrer.

The nature of the case may be stated in a few words. The bill alleges that three companies organized under the laws of the Territory of Wyoming, sold large properties to the plaintiff; that this sale was induced by

fraudulent representations of the agent of these companies as to the amount and value of the properties, whereby the plaintiff was defrauded out of $800,000. This makes a case at law against the companies. In order to make a case in equity against the defendants, the bill alleges that the moneys realized by the companies from the sale were, together with substantially all of their other assets, distributed among their stockholders, (only some of whom are the defendants here,) that the companies are without assets to pay the demand of the plaintiff, and that the companies have not made any use of their franchises, but have abandoned them, and have no officer or agent upon whom process can be served. It is not alleged that judgment has been recovered against the vendor companies, or that any other proceedings have been had or taken to establish against them the alleged liability. *The companies have not been made parties to the bill.*

It is not pretended that there has been a technical dissolution of the companies at common law; on the contrary, it is conceded that such dissolution can be accomplished only by expiration of the charter, or an accepted surrender of the corporate rights of a corporation, or by legislative or judicial act. (See foot of page 15 of appellant's brief.) But it is insisted that to the allegations of the bill which will be found at the foot of page 17 of the record, should for the purposes of this case, be attributed all the effects of a dissolution of the companies at common law; and that for that reason it was not necessary to implead the vendor companies, nor to show judgments at law against them and executions returned unsatisfied. This presents the whole case.

I.

UNDER THE LAWS OF WYOMING THE THREE VENDOR COMPANIES ARE NOT DISSOLVED; THEY ARE STILL SUBJECT TO SUIT; COMPLAINANT HAS NOT PURSUED, IN ATTEMPTING TO COLLECT ITS ALLEGED CLAIM, THE METHOD PROVIDED BY STATUTE. ALSO STATUTES UPON SUBJECTS CLOSELY ALLIED TO THE PRINCIPAL QUESTION.

Frequent reference will be made in this brief to the Wyoming statutes affecting corporations; for convenience we here set forth such sections of the revised statutes of Wyoming, of 1887, as are pertinent.

Organization of Corporation. Sec. 501. At any time hereafter, any three or more persons who may desire to form a company * * * may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, duplicate certificates in writing, in which shall be stated the corporate name of said company, and the object for which the company shall be formed, the amount of capital stock of the said company, *the term of its existence not to exceed fifty years, * * * number of trustees and their names * * * the name of the town and county in which the operations of the said company shall be carried on* and shall file one of the said certificates in the office of the county clerk of each county, wherein the business of the company is to be carried on.

General Corporate Powers. Sec. 502. * * * The persons who shall have signed and acknowledged the same (certificate) and their successors shall be a body politic and corporate in fact and in name, by the name stated in such certificate, and by that name have succession and *shall be capable of suing and being sued in any court of law or equity in this territory.*" * * *

Trustees—Their Election. Sec. 505. The stock, property and concerns of such company *shall be man-*

aged by not less than three nor more than nine trustees, who shall respectively be stockholders in said company and *who shall (except the first year) be annually elected* by the stockholders. * * *

Failure to Elect Trustees. Sec. 506. In case it should happen at any time that an election of trustees shall not be made on the day designated by the by-laws of said company when it ought to have been made, *the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election for trustees* in such manner as shall be provided for by the said by-laws, and *all acts of trustees shall be valid and binding as against such company until their successors shall be elected.*

Liability of Trustees. Sec. 515. If the trustees of any such company shall declare and pay any dividend when the company is insolvent or any dividend, the payment of which would render it insolvent, or which would diminish the amount of its capital stock *they shall be jointly and severally liable for all debts of the company then existing.* * * *

Liability of Trustees. Sec. 523. If the indebtedness of any such company shall at any time exceed the amount of its capital stock *the trustees of such company assenting thereto shall be personally and individually liable* for such excess to the creditors of such company.

General Powers of Corporations. Sec. 543. Every corporation, under the provisions of this chapter, as such has power:

First. To have succession by its corporate name for the period limited in its certificate of charter.

Second. To sue and be sued, complain and defend in any court of law or equity.

* * * * *

Duties and Powers of Trustees on Dissolution. Sec. 647. Upon dissolution by expiration of its charter or otherwise, of any corporation now existing, or which hereafter may be formed, unless some other person or persons be appointed by the legislature or some court of competent jurisdiction, *the board of trustees or directors of such corporation*, or the managers of the corporate affairs, by whatever name known, *acting last before the*

time of their dissolution, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, to sue for and collect the debts and moneys due the corporation, or to compound and settle the same as they may deem best; to have, hold, reserve, sell and dispose of property, real and personal, of every such corporation dissolved, *to adjust and pay all the debts of the corporation dissolved,* to divide the residue of the moneys and property belonging to the corporation dissolved, after payment of debts and the necessary and reasonable expenses, among the stockholders holding stock in such corporation, in proportion to the amount of stock of each stockholder paid up; *all such trustees shall be jointly and severally liable to the creditors and stockholders of such corporation dissolved, to the extent of the property and effects which shall come into their hands and possession, or into the hands or possession of any of them.*

Title to property to vest in trustees. "SEC. 648. The title to all real and personal estate belonging to any such corporation shall, immediately upon the dissolution thereof, unless by a decree of a court of competent jurisdiction, declaring such dissolution, it is otherwise ordered, *pass to and vest in such trustees,* directors or other managers, and an action at law may be maintained by such trustees or directors, or the survivors of them, in their own names, by the style of the trustees of such corporation dissolved, naming it, for the recovery of all such property, or of any damage done to the same, or for the recovery of any debts due to such corporation dissolved.

Dissolution shall not abate actions. SEC. 649: No suit or action at law or in chancery, whereto any corporation is or may be a party, shall abate by reason of the dissolution of such corporation by expiration of its charter of incorporation or otherwise; *but the trustees* or directors of such corporation, *acting as trustees to the stockholders and creditors after the dissolution* as herein provided, or the survivors of them, or the trustee or trustees, receiver or receivers, appointed by the decree of any court of competent jurisdiction, *may prosecute or defend such suit or action in the name of the corporation dissolved, notwithstanding the dissolution.*

Action may be prosecuted in corporate name after dissolution. SEC. 650. *Any corporation dissolved, may, notwithstanding such dissolution, prosecute an action at law in the corporate name, for the use of the person entitled to receive the proceeds of such suit*, upon any cause of action accrued, or which, but for such dissolution, would have accrued to such corporation, and in the same manner and with like effect as if such corporation were not dissolved.

How judgments against dissolved corporations satisfied. SEC. 652. No execution shall issue upon judgments at law, rendered against any corporation, subsequent to the dissolution of such corporation, but the same, with costs thereof, *shall be paid by the trustees, as other debts.*

Chancery jurisdiction on dissolution. SEC. 653. Nothing in this chapter contained shall be construed to impair the jurisdiction of the court of chancery to decree the dissolution of any corporation, or to appoint a receiver or receivers, trustee or trustees, to settle the affairs of any corporations, dissolved by lapse of time or otherwise, and *all trustees or managers of any corporation, acting as the trustees of the stockholders and creditors thereof, after the dissolution of the corporation, shall in all things be subject to the control of a court of chancery;* may be required to give bond, with security to be approved by the court, upon petition of any stockholder or creditor of the corporation dissolved, conditioned for the due discharge of their trust; *may be required to account for the proceeds of the property and effects of the corporation*, and for any failure to give such bond or render such account, or for any default or neglect of duty, they, or any of them, may be removed by the court, and a successor or sucessors appointed.

Procedure on dissolution by stockholders. SEC. 654. Whenever the stockholders of any corporation formed under the laws of Wyoming Territory desire to dissolve the corporation, prior to the time limited by law, or by the terms of its articles of incorporation, they *may do so upon the vote of two-thirds of the entire stock of the corporation*, at a meeting of the stockholders

of said corporation, which shall have been called for the stated purpose of considering a proposition to dissolve such corporation, and *not until its debts shall have been fully paid*, notice of such meeting to be given in the manner now or at the time provided by law for calling stockholders' meetings for the purpose of increasing or diminishing the capital stock of corporations, and when a dissolution has been so ordered, the president and secretary of such corporation shall make and sign notices of dissolution, one copy of which shall be filed in the office of the secretary of the territory, and one copy shall also be filed in the office of the county clerk in every county in which the articles of incorporation of such corporation were filed, and a copy of such notice shall be published in some newspaper printed in each of said counties for the period of at least six weeks, and upon the filing and publication of such notices as aforesaid, such corporation shall be deemed to have been dissolved forever.

Notice of expiration of limitation. SEC. 655. Whenever any corporation formed under the laws of Wyoming Territory shall expire by limitation of law, or by the terms of its articles of incorporation, notices of such expiration shall be made and filed, and publication made in the same manner as is hereinbefore required.

Actions Against Domestic Corporations — Where Brought. Sec. 2,415. An action * * * against a corporation created under the laws of this territory may be brought in the county in which such corporation is situate *or has had its principal office or place of business.* * * *

Service upon a Corporation. Sec. 2,431. A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees or other chief officer, or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or *if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation with the person having charge thereof.* * * *

Service by Publication. Sec. 2,435. Service by publication may be had in either of the following cases * * * *in actions against a corporation incorporated under the laws of this territory, which has failed to elect*

officers, or to appoint an agent, upon whom service of summons can be made, as provided by section twenty-four hundred and thirty-one, *and which has no place of doing business in this territory.*

The Wyoming Statutes point out the way and furnish adequate means for the adjustment by legal remedies of appellant's claim against the vendor companies.

The bill sets forth *in hæc verba* the agreement of November 27, 1882, which is the foundation of the suit and gives the names of the three vendor companies and of the trustees of each. (Rec., 3.) The bill further alleges (Rec., 6) that the directors of the three vendor companies are known under the laws of Wyoming as trustees and are in the bill so designated, and then proceeds (Rec., 17):

"Your orator further showeth that said vendors have no other business except the management of the herds sold to your orator and no other assets, *or substantially none*, except the properties sold by them to your orator; and your orator showeth that after the sale of their said properties to your orator and the receipt by them of the purchase price as aforesaid, said three vendors paid whatever liabilities they had outstanding except their liability to your orator herein set forth, and distributed the money and stock obtained from your orator as the proceeds of said sale and all their other assets amongst their respective shareholders and the same were received by said shareholders and since that time said *three corporations have not nor has either of them made any use whatever of their franchises but they have abandoned the same and neither of said corporations has any officer or agent upon whom process can be served*, and they have not, nor has either of them any assets of any kind out of which any judgment at common law against them or either of them could be satisfied.

"* * * Your orator further showeth that your orator has made defendants to this bill of complaint *all the persons who reside in or are now within the jurisdiction of this honorable court* and known to your orator to have

been shareholders in said three corpor ations, the vendors, or any or either of them at the time of the occurrence of the matters herein complained of."

The bill does not profess to make all the shareholders of the three vendor companies parties defendant, though it does make Alexander H. Swan a nd Thomas Swan "citizens of Cheyenne in the Territory of Wyoming" defendants; the bill alleges that the three vendor companies were corporations organized under the laws of the territory of Wyoming, but makes no other allegation than the foregoing as a reason for not making the vendor companies parties defen lant. *The bill does not allege that there are no trustees or directors of any of the vendor companies*, though it does allege that "neither of said corporations has any *officer* or *agent* upon whom process can be served." Section 505 of the Revised Statutes of Wyoming provides that the stock, property and concerns of a corporation shall be managed by not less than three nor more than nine trustees who shall be elected annually. Section 506 provides that the failure to elect trustees on the designated day shall not work a dissolution of the corporation, but that all acts of the trustees shall be valid against the corporation until their successors are elected. Section 2415 provides that an action against a Wyoming corporation may be brought in the county in which such company "is situated or *has had* its principal office or place business.

Section 501 provides that in organizing a corporation in Wyoming the certificate shall state "the name of the town and county in which the operations of the said company shall be carried on," and that one of the certificates shall be filed in the office of the clerk of the county "wherein the business of the company is to be carried on." Section 2,431 says that in a suit against a Wyom-

ing corporation summons may be served upon the president, cashier, treasurer, secretary, clerk or managing agent, and if none of the aforesaid officers can be found, "*by a copy left at the office or usual place of business of such corporation.*" * * * So, also, section 2,235 prescribes that a Wyoming corporation which has failed to elect officers or to appoint an agent upon whom service can be had, and which has no place of business may be served by publication.

The bill does not allege that the vendor companies did not elect trustees from year to year after the distribution of the proceeds of the sale. Even if it did so allege, the old trustees would under the statutes hold over. The bill does not allege that the vendor companies have no "office or usual place of business;" hence under the statutes service can be had, if no officer can be found, by leaving a copy of the summons at such office or usual place of business; but even if the bill did allege that there was no office or usual place of business service could be had by publication as provided by section 2,435. Under the laws of Wyoming, therefore, where the vendor companies were organized, suit could have been and still can be instituted by complainant, and full and complete service had upon the vendor companies, if made defendants. The vendor companies are not dissolved; they can be dissolved in no other way than that pointed out by the Wyoming statutes and the common law. The jurisdiction of a court of chancery to decree a dissolution is not impaired by any provision of the Wyoming statutes (Sec. 653), and Section 654 provides how stockholders may dissolve a corporation by a two-thirds vote.

The bill does not allege that the vendor companies have been dissolved by a decree of court; by vote of

stockholders or otherwise, but even if it did allege a dissolution, then it is provided by Section 649 that the trustees acting last before the time of dissolution and the survivors of them shall be trustees of the creditors and stockholders; and Section 648 says that upon the dissolution of a corporation unless otherwise provided by decree of court, its property and assets shall vest in the trustees. There is therefore no allegation in the bill which can be distorted into the charge that the vendor companies have been dissolved, or cannot be sued and served. Furthermore, if it be true that the trustees distributed the proceeds of the sale leaving complainant's claim unprovided for, then by Section 515 the trustees are "jointly and severally liable."

Thus in *Sturges* v. *Vanderbilt*, 73 N. Y., 385, we find precisely the same situation; by the New York statutes upon the dissolution of a corporation, the directors of its affairs at that time are constituted trustees of the creditors and stockholders of the dissolved corporation.

The court says:

"It is apparent from what has been said that this action cannot be maintained as a creditor's suit founded on the alleged judgment to reach the funds of the corporation which were paid out to stockholders before dissolution. It could not be, and is not claimed, that such an action could be maintained without a valid judgment and execution against the corporation or its successors, *or without first exhausting the creditor's remedies against the property remaining in the hands of the corporation, or received by its trustees on its dissolution.* It clearly appears by the findings that more than sufficient to pay the plaintiff's claim was possessed by the corporation at the time of its dissolution."

The record shows that at least $2,500,000 was received by the trustees of the vendor companies—an amount largely in excess of complainant's claim of $800,000.

According to the Wyoming statutes the vendor companies — the only vending parties to the contract, the breach of which is declared upon in the bill — still exist, are liable to suit and due and sufficient service can be had upon them if suits be instituted in the Wyoming forum.

The Wyoming statutes clearly point out the remedy that complainant is bound to pursue before coming into a foreign court; if it be true, as alleged in the bill, that the trustees or directors of the three vendor companies improperly distributed the proceeds of the sale among their respective stockholders without providing for the alleged liability to appellant, then it is the duty of appellant to pursue the remedy provided by the Wyoming statutes. (See Sections 523, 647, 648, 652 and 653.)

In *Taylor* v. *Holmes*, 127 U. S., 489, as well as in *Fourth Natl. Bk.* v. *Francklyn*, 120 U. S., 747 (likewise in *Patterson* v. *Lynde*, 112 Ill., 196, 206), it is distinctly held that where the statutes of a state which create a corporation provide remedies regarding such corporation, such remedies must be pursued. Not only has appellant a complete remedy against the vendor companies, all of which are still in existence and subject to suit, but it is furnished an additional statutory remedy by proceeding against the trustees or directors.

Second Point.

Let us now determine irrespective of Wyoming statute law, what was the condition of these companies when this bill was filed; that is to say, on the 14th of July, 1887. At that time Wyoming was a territory and these companies were citizens thereof.

The question is, whether for the purposes of this bill *the allegations as against these defendants have the effect of a dissolution of the companies.*

Bank of Bethel v. *Pahquioque Bank*, 14 Wall., 383:

The Bank of Bethel was a corporation organized under the national banking law, and having failed to redeem some of its circulating notes, the comptroller of the currency appointed a receiver. The Pahquioque Bank asserted that it was a creditor of the Bethel Bank, and presented its claim to the receiver who disallowed it. Thereupon, it brought assumpsit in a State court of Connecticut against the Bethel Bank, which defended on the ground that before the suit was brought it had forfeited its charter by a violation of the currency act in not paying its notes and could be sued only in the Federal court; that being in the possession of the receiver, it was incapable of self-defense, and that the decision of the receiver against the validity of the alleged demand was conclusive.

Mr. Justice Clifford delivered the opinion of the court, in which he stated, with great fullness, the proceedings which the bank law prescribed, when one of the corporations organized under it failed to redeem its notes. It is only necessary to notice the provision shortly stated, on page 396, that from the time the comptroller be-

comes satisfied of the default, "it shall not be lawful for "the association suffering the default, to pay out any of "its notes, discount any notes or bills, or otherwise pros- "ecute the business of banking, except to receive and "safely keep moneys belonging to it and deliver special "deposits."

After stating the provisions of the law, including that particularly set out above, the learned judge said on page 398, that "none of these proceedings, however, "support the theory that the association ceased to exist "when the receiver was appointed, nor at any time be- "fore the assets of the association are fully administered "and the balance, if any, is paid to the owners of the "stock or their legal representatives." And on this principle, the court held that the action in the State court was well brought. If a corporation is liable to an action at law, as in the case cited, when the administration of all its affairs is taken out of its hands and committed to an officer of the law, and this is done because it has failed to pay its most sacred liabilities which decisively shows insolvency; surely, corporations which have distributed all their assets among their stock-holders, and abandoned their corporate franchises, are also liable to such action. The bank, in the case cited, was in no better condition than these vendor companies.

The National Bank v. *The Insurance Company*, 104 U. S., 54:

Dillon was the agent of the insurance company and kept an account with the bank. The bank knew that he was the agent of the Insurance Company, and that conducting its agency was his chief business; and that the account was opened to facilitate that business. Considerable sums having gone into the account to the credit of

Dillon, a large part of his balance was applied to pay his notes to the bank. The insurance company filed its bill against the bank, alleging that these moneys were in Dillon's hands as its agent, and that it had a right to follow and recover them from the bank. The Insurance Company also alleged in an amended bill, that the bank had taken proceedings to wind up its business and had ceased to act as a national bank, and that if it were permitted to distribute its assets among its stockholders, the plaintiff would have no remedy except by many suits against the individual stockholders, and prayed an injunction restraining the bank from paying its assets to its stockholders without retaining a sufficient amount to satisfy the plaintiff's demand. Afterwards the bank filed a motion to dismiss the bill, on the ground that by a vote of two-thirds of its shareholders, it had gone into liquidation and thereby became dissolved. This motion was overruled. The opinion of the court was delivered by Mr. Justice MATTHEWS, who on page 72, states that the stockholders had voted to go into liquidation and close the bank, and then he adds:

"That the bank ceased to do any new banking business after going into liquidation; paid its depositors and other creditors so far as their claims were admitted; reduced its assets to cash, and distributed the money among the shareholders, paying them back their capital in full with an accumulation of two per cent. per annum; the bank's lease of its banking house expired March 1, 1875, when its doors were closed, its clerks discharged and afterwards its furniture removed and disposed of, and its signs taken down. On February 1, 1875 a special authority was issued by the board of directors, authorizing the president and acting cashier to act for and do all legal acts which might become necessary in the liquidation of the business of the bank; it is claimed that these facts show a dissolution of the corporation."

The learned judge then proceeds to examine this contention with great care, and finds that these acts did not work a dissolution of the corporation or avoid its liability to suit. In the case cited and the case at bar, all of the facts are the same, namely: distribution of all assets and disuse and abandonment of the corporate franchises.

The learned counsel for appellant seeks to qualify the effects of these decisive authorities by saying that they were cases in which the dissolution of the corporation is set up as a defense by or on behalf of the corporations to actions of creditors against them. In the case cited and in the case at bar, in one as much as in the other, the question is whether the corporation is liable to suit. If it be, then it cannot assert these matters in abatement of an action against itself, nor, on the other hand, can its creditors assert them in excuse for not prosecuting such action before attempting to reach its stockholders. These two cases in this court are decisive of the question, but it may be interesting to look into some of the cases in the State courts, but before doing so *Taylor* v. *Holmes*, 14 Fed. Rep., 498, 505, 506, and same case, 127 U. S., 489, 492, will be found in point.

Boston Glass Manufacturing Company v. *Langdon*, 24 Pick., 49:

This was an action upon a promissory note, the defendant pleaded in abatement that the plaintiff was not a corporation, and upon the trial showed that it had made an assignment of all its property in trust for the payment of its debts, and had omitted to hold annual meetings, and to choose directors or transact business.

MORTON, Judge, delivered the opinion of the court, in which he stated the rules of the common law governing

the dissolution of corporations, and inquired whether the facts proved had such effect, and found that they did not. In the case cited, the matters were alleged for the purpose of defeating an action in the name of the corporation; the question was, whether the corporation was in such a condition that it could maintain an action; while the question here is, whether these vendor companies were in such condition that this appellant could maintain an action against them. It is of no consequence whether the matter be alleged against the right of the corporation to maintain or to abate an action.

Other cases in Massachusetts, to the same effect, are *Russell* v. *McClellan*, 14 Pick., 63; *Coburn* v. *Boston Papier Mache Mfg. Co.*, 10 Gray, 243; *Folger* v. *Columbian Ins. Co.*, 99 Mass., 267, 274.

Brandon Iron Co. v. *Gleason*, 24 Vt., 228 (decided in 1852):

Here it was held that a corporation did not lose its corporate existence by having ceased to do business after April, 1841, to February, 1852, and by disposing of all its effects and neglecting to choose corporate officers in the mean time.

Barren Creek Ditching Co. v. *Beck*, 99 Ind., 247 (decided in 1884):

In this case it was held that failure for three years to prosecute any corporate business and an abandonment of the organization did not work a dissolution of the corporation.

To the same effect is the earlier case in that state of *Harris* v. *Musklingum Mfg. Co.*, 4 Blackf., 267 (decided in 1836), where the court says:

"To say merely, as this plea does, that the corporation has been dissolved by the consent and acts of its members, is not sufficient. A corporation cannot be dissolved by the consent of its members, except it be by the surrender of their franchise to the government and an acceptance by the government of the surrender."

Blake v. *Hinckle*, 10 Yerger, (Tenn.) 218 (decided in 1836):

Upon a bill by a creditor of a corporation against its stockholders without impleading the company to recover the contents of corporate notes, the allegation was that the stockholders failed and refused to elect directors, and suffered many other acts contrary to the charter, whereby they had been dissolved, and *that no legal process could be served upon the corporation or its officers, and even if judgment could be recovered at law, nothing could be obtained.* The court held that these allegations did not excuse the plaintiff from obtaining judgment at law against the corporation, and did not show a dissolution which justified action against the stockholders, without such judgment.

In *Town* v. *Bank*, 1 Douglass (Mich.) 530, 539, (decided in 1847) it is said:

"That a corporation by its own act can dissolve itself is nowhere asserted, nor can it be sustained. This must be done by the concurrence of the parties to the compact or by the solemn judgment of a court of competent jurisdiction. * * * Suppose that the bank had ceased to perform its functions for a year, for the want of necessary means of action, would this circumstance operate *per se* as a dissolution of the franchise? It is believed that it would not. * * * By thus failing to fulfill the purposes of its creation, its franchise may be liable to forfeiture, but this forfeiture can only take effect after a judgment by a competent judicial tribunal upon a direct proceeding instituted for that purpose by the state or under

its authoity and sanction. The corporate existence would in the case supposed, as in every other case of neglect of duty or abuse of power, continue until that existence is determined by a judicial decree."

In *Evarts* v. *Killingworth Mfg. Co.*, 20 Conn., 447, (decided in 1840), it was held that a joint stock company does not become extinct by the resignation of all of its officers and an omission to elect others, and by the transfer of all its capital stock to a single individual and a cessation of business as a corporation.

To the same effect is *Pierce* v. *Olney*, 20 Conn., 557, and *Enfield Tollbridge Co.* v. *Conn. River Co.*, 7 Conn., 45, in which the court says that a corporation may be dissolved and its franchises relinquished by a surrender, provided the surrender is accepted by the state. Until such acceptance there is no dissolution of the company. In that case there was a non-user by the corporation of all its franchises for more than ten years, and during all that time no corporate act was done by the company.

In *Proprietors etc.* v. *Webb*, 66 Me., 398, (decided in 1877), the plaintiff brought a writ of entry for land; the defendant pleaded that there was no such corporation. Says the court:

"It is alleged that for a time the plaintiff corporation omitted to have corporate meetings." (There seems to have been a lapse of forty years). "But a corporation is not dissolved by merely ceasing to exercise its powers. There was no dissolution of the corporation."

So in *Rollins* v. *Clay*, 33 Me., 132, the court says (page 137):

"A corporation is not dissolved by ceasing to exercise its powers, or because its stockholders and directors may consider it to be defunct."

In *U. S. Electric Lighting Co.* v. *Leiter*, 19 Supreme Ct. Dist. of Columbia, 575, the court says, that:

"A corporation does not become dissolved or cease to exist by failure to elect trustees," and quotes approvingly the language of Morawetz (on Corporations) that "a corporation can be dissolved and its existence wholly terminated only by extinguishment of the corporate franchise conferred by the state upon the body of the corporators, for so long as this franchise exists, the company continues to be a corporation in legal contemplation, and may sue and be sued in that capacity. * * * When the fact of incorporation has been shown, the burden of showing a dissolution is thrown upon the other side, and this can only take place by a surrender by the shareholders, or through a forfeiture by the state in a suit for the purpose. And there are two modes of proceeding judicially to ascertain and to enforce the forfeiture of a charter, the one by *scire facias*, the other by *quo warranto*."

In *Kansas City Hotel Co.* v. *Sauer*, 65 Mo., 279 (decided in 1887), the answer to the bill alleged that the corporation plaintiff had been dissolved by reason of a disposition of all of its assets and a cessation to do business. Says the court, page 288:

"The sale, however, of the hotel property by the plaintiff would not *per se* accomplish its dissolution. (*Hill* v. *Fogg*, 41 Mo., 563.) Nor would a dissolution of corporate existence be implied by mere cessation of active business. (*State Nat'l Bank* v. *Robidaux*, 57 Mo., 446.)"

In *Bruffett* v. *Great Western R. R. Co.*, 25 Ill., 353, 357 (decided in 1861), the court says:

"By a loss of its property the company may have been unable to use and enjoy its franchises, but when they might afterwards acquire the requisite property for the purpose, they may then render the charter available, and such property would become liable to the payment of its debts. The charter and franchises are not an incident that is annexed to and passes with the transfer of the property

of such a company, nor does the company forfeit or become deprived of such rights by the loss of its property. The company may exist after its property is gone. If there is a cause of forfeiture for non-user, that must be determined judicially to make it effectual."

The Valley Bank v. *Sewing Society*, 28 Kans., 424, was an action against a bank and certain of its stockholders to recover deposits certified to, the petition stated:

"That the said Valley Bank and Savings Institution has long ceased to transact business and is insolvent, and has no property or assets of any description out of which said sum or any part could be collected by execution or other process of law.

Held, that "a statement that a corporation has ceased to transact business and is insolvent *is not equivalent to an allegation that the corporation is dissolved.*"

In *Moore* v. *Schoppert*, 22 W. Va., 282, 290 (decided in 1883), the court in reviewing what constitutes a dissolution of a company, says:

"The charter of a corporation does not expire by reason of acts of omission or commission on the part of the company, even where they constitute a sufficient ground for declaring a forfeiture, but the franchise continues in full force until a forfeiture is claimed by the state granting them, and this can be done only in a proper proceeding by which the cause of forfeiture is ascertained and a dissolution adjudged."

State v. *Baron*, 58 N. H., 370: Neglect of a corporation to hold meetings for ten years will not operate to dissolve it.

A series of cases may be found in the books (they are cited at length by appellant) holding that acts and omissions such as are alleged in this bill justify actions by creditors against stockholders. But it is important to note the grounds of such decisions. They are all cases resting upon a statute by which stockholders are

made liable for corporate debts at the dissolution of the corporation. The question arose, what was a dissolution within the meaning of the statute? In solving that question, some courts have felt themselves justified, in order to advance the statutory remedy, to consider certain acts as equivalent to a dissolution. The cases all proceed upon that theory, and the rule established by them is applicable only to cases arising under such statutes. They have no application to the cases which must be determined upon common law principles. The leading case of this character is *Slee* v. *Bloom*, 5 Johns. Ch., 367; 19 Johns. Ch., 456. The act under which the corporation was created declared "that for all debts which shall be due and owing "by the company at the time of its dissolution, the per- "sons then composing said company shall be individually "responsible to the extent of their respective shares of "stock in said company, and no further." The plaintiff alleged *a judgment against the company, and the issue and return of execution* and certain acts and omissions much more decisive than we have here, showing the determination of the stockholders to abandon the company and a disposition of all its corporate property. Chancellor Kent held that these acts did not amount to a dissolution which justified the bill against the stockholders, but his decree was reversed by the Court of Errors, where Chief Justice Spencer delivered the leading opinion, and it will be seen, on page 475, that he bases his judgment upon the statute. The bill alleged that the defendant stockholders "had come to a resolution never to make "another election but to abandon the factory and "corporation altogether" * * * "*and had deter-*

"*mined to suffer and cause the corporation to be dis-*
"*solved, and had already suffered and caused the same*
"*to be dissolved.*" In the present case there is no allegation of dissolution or intention to dissolve. In the opinion of Chief Justice SPENCER on the appeal from Chancellor KENT it is said: "The ground on which I "base my opinion that the corporation is dissolved is that "they have done and suffered to be done acts equivalent "to a direct surrender. * * * *The bill charges sub-*
"*stantially that the corporation is dissolved and not one*
"*of the respondents asserts that it had existed* * * *
"In point of good sense this corporation was dissolved
"*within the meaning and intent of the act as regards cred-*
"*itors* when it ceased to own any property * * * and "when it ceased for such a space of time from doing any "one act manifesting an intention to resume their corpor-"ate functions." And notwithstanding the care with which the Court of Errors circumscribed its meaning, Kent (Com., Vol. 2, star page 311), shows that Chief Justice Spencer's decision was carried to "the utmost ex-"tent." That the doctrine of *Slee* v. *Bloom* is exclusively statutory in its application is illustrated in subsequent New York cases, like *Hollingshead* v. *Woodward*, 35 Hun., 410; *N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362; *Lee* v. *American Atl. & Pac. Canal Co.*, 3 Abbott's Pr. (N. S.) 1; *Nimmon* v. *Tappan*, 2 Sweeney, 652, 659. In *Bradt* v. *Benedict*, 17 N. Y., 93, the court in referring to *Slee* v. *Bloom*, intimates that the latter supplied "what might be deemed a defect in the statute," rather than announced "the law as it was to be found in "the books."

All of the cases cited from New York by counsel for appellant are of like character to that of *Slee* v. *Bloom*.

They are devoted to the statutory construction. The same is true of many of the other cases cited, among which may be particularly mentioned *Central Agricultural & Mechanical Association* v. *Alabama Gold Life Ins. Co.*, 70 Ala., 120, and *Gibbs* v. *Davis*, 27 Fla., 531.

In the Alabama case we find the same vital distinction already pointed out. The Alabama statute declared that:

"The stockholders of any such corporation are liable for all debts due from it at the time of its dissolution, to the extent of their stock."

The bill sought to enforce a debt of an insolvent corporation against its stockholders under the statute just quoted. The court recognizes the distinction between a common law dissolution and that meant by the statute. The decision rests principally upon *Slee* v. *Bloom*, and the court adds:

"For all practical purposes, though it may have been possible for the association to reorganize and reinvigorate itself, as to creditors it was dissolved *within the meaning of the statute*. Any other doctrine would be unreasonable and would render the statute and the liability it imposes incapable of affording the creditors of corporations the benefit and security intended." It will be observed also, that in the Alabama case the insolvent corporation was a party defendant.

The Florida case is peculiarly illustrative of our views. It has to do entirely with the liability of stockholders, based upon the interpretation given by the court to the statutes of Florida. The whole decision rests upon statutory rights, and, like the other cases we have referred to, furnishes no precedent for the case at bar. Thus, the court says (page 552):

"It is contended for the defendant in this case, that before resort can be had upon him as a shareholder for a debt of the company, that a dissolution of the corporation must first be declared and established either by legislative enactment or by the judgment or decree of some court. The decided weight of authority is against this view of the question, and the proposition may now be said to be settled, that *where the statute makes dissolution of the corporation a condition precedent to the enforcement of the shareholders' liability, the dissolution in the sense in which the term is here used, takes place when the corporation comes into a condition of having debts and no assets, and has ceased to act and exercise its corporate functions.*"

The court cites several cases interpreting statutes similar to those of Florida. Among the cases so cited are embraced nearly all those upon which appellant relies. Both the Florida court and appellant refer to *The State Savings Association of St. Louis* v. *Kellogg*, 52 Mo., 583. This case, is predicated entirely upon a statutory construction. It holds in effect that under the Missouri statute, making shareholders liable in case of a dissolution, the legislature intended that the individuals composing the corporation shall be liable for its debts when by reason of want of funds it cannot exercise its corporate powers. *Carey* v. *Cincinnati, etc., R. R. Co.*, 5 Ia., 359, cited page 28 of appellant's brief, and also referred to in the Florida case, does not help appellant's position. The case was before the court upon demurrer to a bill. The complainant sought to set aside an alleged fraudulent conveyance by an Indiana corporation. The bill alleged, first, that the corporation never had any legal existence, and, second, if it did have such existence it had been dissolved.

The court says (page 367):

"If as a legal and necessary consequence of certain acts, it has ceased to have a corporate existence, and any

individual should claim that he thereby has been injured, * * * (he) need not, in the first instance, institute a proceeding and have it declared that its existence has ceased. * * * The fact that its existence has ceased being established, it becomes dissolved, and may be so treated (citing cases), and, therefore, if as stated in the bill, the original company has lost its identity and existence by becoming merged into the new organization, then it may be treated as at an end, for it is in no position to necessarily require a judicial inquiry to determine its existence. * * * If, on the other hand, it had an existence, and has suffered no act which, *per se*, works a forfeiture or dissolution, * * * or if it has not surrendered its franchises—then we do not think that the courts of this state can determine the question either in a direct or collateral proceeding. A judgment of forfeiture must be first obtained in a state conferring or granting corporate powers."

Further on the court says:

"If its corporate existence has not become merged into that of the new company, it would seem to be necessary that before it should be concluded by any decree, it should have its day in court, and that, strictly, no proper decree could be rendered in the premises."

We inquire, how will the learned counsel for appellant reconcile that decision with the present case to which the vendor companies are not made parties?

Stone v. *Flanningham*, 109 Mass., 303, next cited by appellant, strongly supports the comment we have made upon the above cases. The testator bequeathed a fund to the incorporated trustees of an academy, with the limitation that if the corporation was dissolved the property should go to the testator's heirs. After the trustees had administered the trust for many years the legislature passed a statute subject to their acceptance, authorizing them to transfer the property to the town. The statute was accepted; the trustees did transfer the property to

the town, and ceased thenceforth to exist as a corporation. In a suit brought by the testator's heirs to recover the fund nineteen years after its transfer to the town, it was held that the corporation within the meaning of the will, was dissolved, and that the fund was therefore forfeited to the heirs. The court held that the testator meant not a common law, but a practical extinction of corporate life, and that the word "dissolved" was to be construed in the light of the circumstances and in its popular and not technical sense. Appellant next cites *Dane* v. *Young*, 61 Me., 160. That was a bill brought by the receiver of a defunct bank against certain stockholders of that bank for a contribution for the purpose of meeting the claims of creditors. A perpetual injunction was granted against the bank doing business. The court held:

"That the charter of the bank expired on the 18th day of May, 1861, when the injunction was made perpetual. In order to give effect to the foregoing provision of the statute it is not necessary that the charter of a bank should have expired by limitation. It is sufficient if it has expired by operation of law. Such expiration takes place when an injunction against a bank is made perpetual. *Wiswell* v. *Starr*, 48 Me., 404." The case has absolutely nothing in common with the one at bar.

Appellant next cites *Bacon* v. *Robertson*, 18 How., 480. That case is still further from the mark. There, there had been a decree and complete dissolution of the company under a judgment of forfeiture rendered against it by a court of competent jurisdiction. It was an attempt by certain stockholders of the dissolved bank, to establish their title to a surplus remaining in the hands of the trustee (who was in charge of the bank's assets), after all the debts had been paid. So also in *Curran* v. *State of Arkansas*, 15 How., 304, also cited by

appellant, we find nothing to support appellant's contention. There the plaintiff had recovered a judgment against the Bank of Arkansas upon which an execution was duly returned unsatisfied.

Mr. Justice CURTISS says:

"The general scope of the bill, therefore, is to obtain the aid of a court of equity to reach such assets of the bank as ought to be appropriated to satisfy this judgment debt."

In that case, also, the corporation, viz: the bank was made a party defendant.

In *Railroad Company* v. *Howard*, 7 Wall., 392, cited by appellant, the plaintiff had recovered judgment against the debtor corporation, and execution had been returned unsatisfied. The court says (Mr. Justice CLIFFORD) that:

"The present suit is not one against stockholders to "compel them to pay a corporate debt out of their own "estate, but it is a suit against the corporation and cer- "tain other parties holding or claiming assets which be- "long to the principal respondent, to prevent that fund "from being distributed among the stockholders of the "corporation before the debts due to the complainants are "paid." (Page 413.) The last case cited by appellant upon the point now under consideration is *Broughton* v. *Pensacola*, 93 U. S., 266. There the plaintiff proceeded by bill in equity to recover from a municipality certain railroad coupons. The bill alleged that the city had made no provision for the payment of the coupons; that the city government was thereafter reorganized, and in its reorganized capacity refused to pay the coupons. The bill was dismissed upon demurrer, and the court says: "It follows, from the views we have expressed, that the

" remedy of the plaintiff was not by suit in equity, but by " an action at law against the present corporation, upon " the coupons." And the decree of the lower court was affirmed. We think that we have shown that *Slee* v. *Bloom*, and cases of that class as well as the other references in appellant's brief, do not apply to the question under discussion. That question is whether the vendor companies were, at the time of filing the bill, according to the allegations therein contained, in such condition that they could not be sued at law. That, under statutory regulations, stockholders under similar circumstances may be proceeded against, is of no consequence.

In some of the very cases referred to by appellant, it has been distinctly stated that acts and omissions of such companies do not operate their dissolution. One of them so cited is *Kincaid* v. *Dwinelle*, 59 New York, 548. The New York Silk Manufacturing Company was a corporation organized under the laws of New York, and one of its servants commenced an action against it and recovered judgment for his services, after a receiver of the company had been appointed, who had entered upon his duties, and long after the company had ceased to do business. Thereupon the plaintiff assigned the judgment to Dwinelle who sued the defendant as a stockholder of the company, to recover from him the moneys adjudged against the corporation. The defendant contended that the corporation was dissolved by the appointment of the receiver, and the suspension by it of its corporate business; and that therefore the judgment against it was void. Allen, Judge, delivered the opinion of the court, in which he stated on page 552 that " to effect a dissolution of a corporation, there must be the judgment of a court of competent jurisdiction declaring it dissolved; and until such judgment, cred-

itors may proceed by suit against the corporation, unless restrained by injunction. (*People* v. *President of Manhattan Company*, 9 Wend., 351; *In re* Reformed Presbyterian Church, 7 How. Pr., 476; *Mickles* v. *Rochester City Bank*, 11 Paige, 118). *A corporation may by virtue of proceedings against it, or by reason of its pecuniary condition, cease to exist for all practical purposes, for which it was created, or for which a corporation may exist; but it cannot be held to be actually dissolved till so adjudged and determined, either by judicial sentence or the sovereign power.*" After reviewing some of the New York cases, the learned judge says on page 555, "that the action was well "brought by the assignor of the plaintiff against the cor- "poration." This and other cases justify us in saying that where statutes give creditors remedies against stockholders of companies at their dissolution, the proceeding may be taken when there has been a suspension of the corporate activity; yet at the same time companies in such condition are not considered dead, but are capable of being impleaded as defendants in actions at law, and suits in equity. The result of the whole of this discussion may be shortly stated: it is that the distribution by a corporation of all its property among its stockholders, suspension of the use of its franchises, and abandonment of them, do not operate its dissolution, and thus place it in such condition that it is not liable to suit, and that statutes providing that stockholders may be held for debts owing when the company is in such condition, do not withdraw the company itself from liability to actions for the recovery of its debts. It is with corporations, as with natural persons. A dead man cannot be sued; a live man, although very sick, may be sued. So a corporation must be either dead or alive; if it has been dissolved, it is dead and cannot be sued; if it be in the condition of these companies, it may be very sick, but is alive and capable of suit.

THIRD POINT.

Such being the condition of these three vendor companies at the time of the filing of the bill, that is to say, being at the time capable of being sued for their debts, and service of process upon them being provided by statute, it results that they should have been impleaded in this bill, either as plaintiffs or defendants, and without their presence before the court and upon the record a decree could not pass against these defendants. They are indispensable parties.

This is a defect which cannot be cured by amendment, because the indispensable parties cannot be brought in, being citizens of Wyoming.

They are hence out of the jurisdiction, and are moreover territorial (*Barney* v. *Baltimore*, 6 Wall., 280), *not state citizens; and if they could be brought in, the controversy would not be a proper one for this court to decide.*

The cases are as follows:

Dormitzer v. *Illinois & St. Louis Bridge Company*, 6 Fed. Rep., 220.

This was a bill in equity, styled by the court a "creditor's bill to enforce a sort of equitable garnishment." The suit was brought in Massachusetts in the United States Circuit court; the bridge company, defendant, was not a resident of Massachusetts, and could not be brought into court. The other defendants demurred to the bill on the ground that the corporation was a necessary party defendant. The demurrer was sustained, and the court by Lowell, C. J., in deciding the demurrer passed upon several points as follows:

First. That a United States Circuit court cannot at-

tach the property and assets of the defendant, unless he is an inhabitant of the district where the suit is brought.

Second. That the bridge corporation was a necessary party to the suit, it being an action for the collection of money due for unpaid assessments on its stock, *and for capital once paid in, but afterwards improperly divided.*

On this point Judge LOWELL said:

"The corporation is a necessary party, actual or constructive, because it will not else be bound by the decree, and the other defendants may be twice vexed. It has also the right to show that the judgments against it have been satisfied, or that it has the means for satisfying them without further assessment.

"As a rule in equity it may be stated more broadly that the suit is one which, if the allegations are true, the corporation was bound to institute; and if it fails to do so, it is a necessary party on one side or the other of the suit, in order that its rights in its own assets may be properly cared for. (See *Cunningham* v. *Pell*, 5 Paige, 607; *Spear* v. *Grant*, 16 Mass., 9; *Wood* v. *Dummer*, 3 Mason, 308; *Davenport* v. *Dows*, 18 Wall., 626; *Lyman* v. *Bonney*, 101 Mass., 562; *Deerfield* v. *Nims*, 110 Mass., 115; *Mann* v. *Pentz*, 3 N. Y., 422.)

"I cannot see how it is possible, consistently with the decisions and the uniform practice, to decide this case in the absence of the corporation. *If it had been actually dissolved, the case might be different. There are allegations which come as near to that as truth will permit, I suppose; that it had ceased to do business; that its bridge had been sold under a foreclosure; and that it is defunct to 'all intents and purposes.'* I do not understand this to mean that it is no longer capable of suing and being sued, but that it is dead for all useful purposes as a bridge owner. *If it remains subject to process, the facts alleged appear to be immaterial.* I infer, from the facts which are stated, that it is so liable at present."

And further the court says:

"*If, then, a corporation is a necessary party to a suit, for collecting moneys due for unpaid assessments of its*

stock, or, which is very similar, for capital once paid in, but afterwards improperly divided, this bridge company, which is incorporated by the State of Missouri, of which state the plaintiff is a citizen, cannot be summoned in as a defendant in the district of Massachusetts."

Walsh v. *R. R. Co.*, 6 Fed. R., 797:

In this case an action was originally commenced in the Circuit court of St. Louis, Missouri, by Walsh *et al.* against the railroad company *et al.*, and the petition for removal was made by defendant, Jesse Seligman, alone, on the ground that the controversy was wholly between citizens of different states; that the whole matter in controversy was as to the liability of the petitioner and his co-defendants, Joseph and James Seligman, and that the other defendants were only nominal parties.

Motion to remand was made upon the following grounds:

(1.) Because only one of the defendants, Jesse Seligman, petitioned for removal, and because the suit was not one in which there could be a final determination of the controversy, as far as concerned him, without the presence of the other defendants. (2.) Because the controversy in the suit was partially between parties who are citizens of the State of Missouri, and not wholly between citizens of different states, between whom it could be fully determined. (3.) Because the controversy was not wholly as to the liability of said Jesse, James and Joseph Seligman, but involved questions as to rights of property in which other defendants were interested.

Held by McCrary, C. J.:

"*The corporation defendant is a necessary party to a bill to enforce a judgment against it by compelling contribution from its stockholders.* All the stockholders are likewise necessary parties if they apply to be heard, to the end that each may be assessed his equitable share

only. Hence it is that in this case the controversy is not wholly between citizens of different states, and cannot be finally determined as between them.

"Motion to remand sustained."

Bank v. *Smith*, 6 Fed. R., 215: In this case plaintiff, the First National Bank of Hannibal, Missouri, had obtained judgment against two coal companies, incorporated by the laws of Missouri and resident of that state. The plaintiff bank filed a bill in the United States Circuit court in Massachusetts making certain stockholders of the coal companies defendants, and praying in substance that they should be required to account for the unpaid subscriptions and stock and dividends received out of the capital and assets of the insolvent coal corporations, and that these assets may be applied in payment of the judgments recovered by the bank against the coal companies. *The bank in its bill failed to make the two coal companies parties defendant, whereupon a demurrer to the bill was filed and sustained by* NELSON, D. J.:

"It is too clear to admit of discussion that the corporations (meaning the two coal companies) are necessary parties to suits like these. Unless they are made parties they will not be concluded by decrees made in the cases on the merits, and the defendants might be called upon a second time to account for the same assets at the suit of the corporations, or receivers appointed over their affairs. *The defendants have the right to insist that the decree shall conclude the plaintiffs, the corporations and all other creditors, and afford a full and complete protection against future suits for the same causes of action.* Such decrees cannot be made in suits when the corporations are not parties, or by a court having no jurisdiction to require the legal presence of the corporations in the proceedings." Citing *Wood* v. *Dummer*, 3 Mason, 308, 316; *Shields* v. *Barron*, 17 How., 130; *Ogilvie* v. *Knox Ins. Co.*, 22 How., 380; *Barney* v. *Baltimore*, 6 Wall., 280; *Davenport* v. *Dows*, 18 Wall., 626; *Kendig* v. *Dean*, 97 U. S., 423; *Tremain* v. *Amory*, decided by Lowell, J., in the First Circuit court at Boston, June, 1879.

"The rules which govern the circuit courts of the United States in cases like these are well settled. The court refuses to entertain a suit where a party, whose legal presence in the proceeding is necessary, cannot be subjected to its jurisdiction.

"As the corporations have not been and cannot be made parties to these suits for want of jurisdiction of the court over them, the demurrers must be sustained and the bills dismissed without prejudice.

Ordered accordingly."

Davenport v. *Dows*, 18 Wall., 626:

This was an action by Dows, a citizen of New York, against the city of Davenport, to arrest the collection of a tax levied on property of the Chicago, Rock Island and Pacific Railroad Company within its limits. The bill assigned as a reason for being filed by Dows, a stockholder in the company instead of by the company itself, that the company neglected and refused to take action on the subject.

Defendant demurred because the railroad company was not made a party to the bill, and the demurrer was *overruled*.

But this decision of the court was REVERSED BY this court, which held, per DAVIS, J.:

"That a stockholder may bring a suit when a corporation refuses, is settled in *Dodge* v. *Woolsey* (18 Howard, 340), but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly, the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it.

"It would be wrong, in case the shareholder were un-

successful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, *a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.*" (Citing *Robinson* v. *Smith*, 3 Paige, 222, 223; *Cunningham* v. *Pell*, 5 *id.*, 607; *Hersey* v. *Veazie*, 24 Maine, 1; *Charleston Insurance and Trust Company* v. *Sebring*, 5 Richardson, Equity, 342; *Western Railroad Company* v. *Nolan*, 48 New York, 523; *Bagshaw* v. *Eastern Union Railroad Co.*, 7 Hare, 114–131.)

"In this case the tax sought to be avoided was assessed against the Chicago, Rock Island and Pacific Railroad Company, and the decree rendered discharges the company from the payment of this tax. *The corporation, therefore, should have been made a party to the suit, and as it was not, the demurrer should have been sustained.*"

Inhabitants of Deerfield v. *Nims*, 110 Mass., 115:

The corporation is a necessary party to a bill in equity by a creditor of the company against officers and stockholders of the corporation who have divided its property among themselves for the purpose of evading its liabilities. The facts in this case were: Bill in equity alleging that, upon an information brought by the attorney general, at the relation of the plaintiffs, against the proprietors of Deerfield river bridge, a corporation established by the commonwealth, a decree was entered that the corporation should pay $4,000 to the plaintiffs, and execution in favor of the plaintiffs issued thereon; that the officers and stockholders of the corporation, desiring to evade the duties and liabilities of the corporation, divided its property among themselves, and the execution was returned unsatisfied; that the plaintiffs had been unable to learn the names of all the members and stockholders of the corporation, but that they believed that Nims and certain other persons were stockholders; and, "to

"the end that the proprietors of Deerfield River bridge "and the members and stockholders of said corporation, "and especially the several members and stockholders "hereinbefore named, may full and true answer make," the bill prayed for process against Nims and the other persons named; but no process was prayed against the corporation.

The court, by Chapman, C. J., said:

"The bill seeks to obtain payment of a judgment and execution which the plaintiffs have obtained against the proprietors of Deerfield bridge, a corporation. It appears that, though the corporation is named in the bill, yet no process is prayed for against it or served upon it, but the suit is against several persons who are sued as stockholders. They demur on several grounds, one of which is that the corporation is not joined as defendant. This ground is valid; for, as the corporation is the alleged debtor, it is a necessary party, for the reason stated in *Lyman* v. *Bonney*, 101 Mass., 562. The other grounds ought not to be discussed till the corporation is brought in; for it should have an opportunity to be heard on these matters.

"Demurrer sustained."

Lyman v. *Bonney*, 101 Mass., 562: This case decides that a bill in equity may be maintained against the officers of a mutual insurance company who having funds of the company in their hands to pay a claim of the plaintiff's on the company for a loss, have neglected and refused to pay it and fraudulently applied the funds to other (including their own) purposes. *But to such bill the company is a necessary party.* As to this point the court said:

"But the defendants demur to the bill, and one of their prominent grounds of demurrer is that the corporation ought to have been made a party.

"We think this ground is valid. The debt is due from the corporation, and not from the defendants; it was to be paid by the corporation; and the defendants, in paying it, would act as agents of the corporation, and not on their own

behalf. The funds which are alleged to have been misappropriated were the funds of the corporation; and the action of the defendants, which is alleged to have been wrongful, was professedly as officers of the corporation. The general rule, as stated in Calvert on Parties, 11, is that all parties having an interest in the object of the suit ought to be made parties. It is also said that, 'where different persons have been liable to a payment, the court has required the presence of them all, for the purpose of ascertaining whether any of them had already made it.' *Ib.*, 16. Although it might not be probable that the corporation would pay this debt through any other agent than that of its officers, yet the court cannot know that this has not been done, and the question cannot be conclusively settled without making the corporation a party. And on all the questions that may arise in the case, it is important that the final decree shall be binding upon the corporation."

Taylor v. *Holmes*, 14 Fed. R., 516; same case, 127 U. S., 489.

This was a case where a corporation's charter had expired by limitation, and under the laws of New York it appears that its officers thereafter became trustees of its property for the benefit of the creditors (similar to Wyoming statutes). Some years after a suit was instituted by certain creditors of the company asserting claims on the corporate property. This suit was dismissed upon other points, especially the point of *laches* in bringing suit; but in course of the opinion DICK, J., said:

"It seems to me that the directors (trustees) or their legal representatives ought to be made parties, so that they may have an opportunity of being heard, and have the whole subject-matter in controversy so adjusted and settled by a decree of this court as to free them from the duties and liabilities of future litigation."

Robinson v. *Smith*, 3 Paige, 222;
Forbes v. *Whitlock*, 3 Edw., 446:

Where there has been a waste or misapplication of the

corporate funds by the officers or agents of the institution, a suit to compel them to account for the loss should be in the name of the corporation, unless it appears that the directors of the corporation refuse to prosecute such suit, or the present directors of the company are the parties who have made themselves answerable for the loss; but in that case *the corporation is nevertheless a necessary party.*

Shawhan v. *Zinn*, 79 Kentucky Reports, 300; S. C. Vol. 4 Am. & Eng. Corp. Cases, 243, 247:

"In order to enable a stockholder to sue for the corporation, or his associate stockholders, where the rights of the corporation are involved, he must allege that the directors decline to sue, or refuse to permit him to sue in the name of the corporation, and the corporation must be a party plaintiff or defendant.

"The failure to make the corporation a party is not a mere defect of parties, to be taken advantage of by special demurrer, but leaves the stockholder without a cause of action, the party entitled to the relief not being before the court.

"If the plaintiff fails to make the corporation a party, it is not proper for the court to require him to do so, and his action should be dismissed absolutely."

If the position of the three vendor companies is such that they should have been made parties, then they are indispensable parties.

See cases cited *supra*, also,

Russell v. *Clark's Executors*, 7 Cranch., 98:

In this case the incapacity of the court to proceed against indispensable parties is discussed, and three classes of parties to a bill in equity are pointed out: 1. Formal parties 2. Interested parties who are proper and necessary, but not indispensable; and, 3. Indispensable parties, being persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can-

not be made without either affecting that interest or leaving the controversy in such condition that its final termination may be wholly *inconsistent with equity and good conscience*. Our case affords an illustration, in its possible results, of the inconsistency with equity and good conscience that is meant by the court in *Russell* v. *Clark*. For instance: Suppose that one of the stockholders has received $1,000, and that the cattle company, complainant in this suit, recovers judgment against that stockholder, and the stockholder pays over to the cattle company, complainant, such $1,000. Suppose now that X, a creditor of one of the three vendor companies, at present unknown, presents his claim to the officers of that vendor company, and they admit its validity, and say they have no funds, but will call upon their stockholders to contribute, and accordingly make a call upon this stockholder. He replies that he has paid the $1,000, representing his entire interest, to the Swan Land and Cattle Company, complainant. Clearly that reply would not be good against the vendor company, because it is not a party to this litigation, and not bound by the judgment or decree in it. And if the vendor company is allowed to collect a further contribution from the stockholder it subjects him to a double liability.

Shields v. *Barrow*, 17 How., 139:

"Indispensable parties are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

And further:

"Neither any act of Congress nor any rule for the equity practice of the United States Circuit courts enforces a Circuit court to make a decree in equity in the absence of an indispensable party, whose rights must be necessarily affected by such decree."

Bank v. *Carrolton Railroad*, 11 Wall, 624:

"Although in general a bill in chancery will not be dismissed for want of proper parties, the rule resting as it does upon the supposition that the fault may be remedied and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Hence in a case where if all the partners were made parties to the bill the court in which the bill was filed would, from the character of its jurisdiction (which was confined to persons resident within particular districts, which one of the partners here was not), be without any jurisdiction of the controversy, the bill must be dismissed."

Comment by Mr. Abbott upon Sec. 737, Rev. St., U. S., 2 Abbot's National Digest, page 174:

"In the courts of the United States, on account of their peculiar jurisdiction over parties, although the plaintiff will be required to do all in his power to bring every person concerned in interest before the court, yet if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach—e. g., a non-resident—ought not to prevent a decree upon the merits. *If, however, such a decree cannot be fitly made without substantial injustice to third persons, the court will withhold its interposition.*"

(Citing *Elmendorf* v. *Taylor*, 10 Wheat, 125; 1851, *Union Bank* v. *Stafford*, 12 How., 327; 1st Circ., 1840, *Harrison* v. *Urann*, 1 Story, 64; 3 L. Rep'r., 92; 2d Circ. (Vt.), 1827, *Society for the Propagation of the Gospel* v. *Hartland*, 2 Paine, 536; 3d Circ. (Va.), 1806, *Joy* v. *Wirtz*, 1 Wash., 517; (N. J.), 1827, *Wisner* v. *Barnet*, 4 Wash., 631.)

Comment by Pomeroy:

"In an action by a judgment creditor to reach the equitable assets of the debtor in his own hands, or to reach property which has been transferred to other per-

sons; or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant and the suit cannot be carried to final judgment without him. In some cases, as when the property had been assigned at different times to different assignees, or is held by different legal owners who are all made co-defendants, he is the very link which unites them all together, the common center to which they are all connected, and it is because he is a party defendant that they can all be joined in one action as co-defendants."

Pomeroy's Remedies, Sec. 347.

When a want of indispensable parties cannot be supplied without ousting jurisdiction, the bill should be dismissed.

See cases cited *supra;* also *Fourth Nat'l. Bank* v. *New Orleans & Carrollton R. R. Co.*, 11 Wall., 624.

Shields v. *Barrow*, 17 How., 130.

Barney v. *Baltimore*, 6 Wall., 280.

Equity rule 47 and section 737 of the Revised Statutes are invoked for the purpose of excusing the bringing in of these vendor companies. But by the very terms of the rule and the statute, when the presence of necessary parties cannot by proper process be obtained, the objection is fatal, as in the case of *Barney* v. *Baltimore City*, 6 Wall., 284.

The attempt to show that these companies were not indispensable parties is ingenious but futile. If this bill as now framed may be maintained, we are liable, as already shown, to be twice vexed by the same complaint. It is said that this cannot be the case, because these companies have been wound up, and cannot begin business anew if any shareholder objects, and therefore, they cannot sue their stockholders

to recover assets distributed among them. We dispute the correctness of that assertion, but for the purposes of the argument, let it be admitted. Then, again, it is said that stockholders cannot sue to recover assets thus distributed, because they participated in the illegal act. Let that be admitted. These two cases, however, do not by any means exhaust the list of all the proceedings which may be taken for the purpose of investigating the same matters which are alleged here against us. Under section 653 of the Wyoming Statutes, it is perfectly competent for certain of the stockholders of the company, for instance, Alexander H. Swan, Thomas Swan, F. B. Hicks and Zachariah Thomasson, who are shown to live in Wyoming, (Hicks and Thomasson are not made parties) to institute a proceeding in a court of chancery of that state and obtain the appointment of a receiver of each of these vendor companies. The same court could levy an assessment upon the stockholders for the purpose of paying off the plaintiff's claim, and in that proceeding these defendants as well as the other stockholders (not parties here) would be confronted with the same complaints which are here made and be put to their defense against them. If they sought to avail themselves of a decree upon this bill, the answer would be, that the new proceeding is on behalf of the corporation, for the purpose of recovering its assets illegally distributed, in order that it may discharge its duties to its creditors, and that it was not a party to the suit in which decree was obtained against us, and by which decree we were compelled to pay a certain sum, and, therefore, is not concluded thereby. (For an exact illustration, see *Patterson* v. *Lynde*, 112 Ill., 196.) All this is very plain and simple and needs but to be recounted to show that there is no escape from the objection that these com-

panies must be parties to this proceeding against the defendants as its stockholders. Other proceedings may be taken against us, but it is unnecessary to state or trace their form or course, in order to show that we may be again vexed with the same matters which are here charged against us. It is no answer to say that these defendants live in Illinois, and such proceedings must be taken in Wyoming, and that out of the courts of that state, process cannot issue so as to compel us to appear there. If any one of us cross the line into Wyoming, whether to look after and protect our other business interests, or for pleasure or for any other purpose, we must be exposed to the service of process. It never before was suggested that because process could not legally be served upon a defendant in a particular jurisdiction, that therefore, he should be exposed to the inconveniences and mischief of being twice sued for the same matter.

Another unanswerable argument suggests itself: Only a part of the stockholders are defendants here; the vendor companies are not; a decree goes against the defendants; they then file a bill for contribution from the stockholders not parties to the proceeding; the decree here (the companies not being parties) is not a binding adjudication, and the whole matter must be litigated over again at the expense of the defendants in another forum, and perhaps with an adverse result.

The cases cited by appellant in support of the contention that the vendor companies are not indispensable parties may now be noticed. *Walser* v. *Seligman*, 13 Fed. R., 415 (s. c. 21 Blatchf., 130) decides that a creditor *must first obtain a judgment and have an execution returned nulla bona* before seeking to hold the stockholders of the debtor corporation liable for assets improperly distributed

among them. Some of the complaining creditors had recovered in Missouri judgments upon which executions had been returned unsatisfied. The debtor corporation was organized under the Missouri laws. The statement by Judge Wallace that the corporation was not an indispensable party was not necessary to the decision and was based upon the assumption that the Missouri corporation was in effect dissolved. The learned judge says: "By "the decisions of the courts of Missouri it is practically "dissolved."

The decisions to which the court referred are *Moore* v. *Witcomb*, 48 Mo., 543; *State Savings Institution* v. *Kellogg*, 52 Mo., 583; *Perry* v. *Turner*, 55 Mo., 418. In other words, the court considered the Missouri corporation as dissolved, relying in doing so upon the supposed legal interpretation which the Missouri courts had given to corporations similarly situated. As a matter of fact, however, the Supreme court of Missouri in a later case (*Kansas City Hotel Co.* v. *Sauer*, 65 Mo., 279), held that the allegation that a corporation had been dissolved by reason of a disposition of all of its assets and a cessation to do business "would not *per se* accomplish "its dissolution." The Missouri decisions upon which Judge Wallace relied are based upon *Slee* v. *Bloom*, to which we have already referred.

Appellant next cites *Wellman* v. *Howland Coal and Iron Works*, 19 Fed. R., 51. It is meagerly reported and the decision of Judge Barr refers to no authorities and does not seem to have been very carefully considered. The court says: "The complainant did not bring this suit "against the corporation but against Small, the stockhol- "der. *In its present condition no personal judgment can* "*be rendered against the company* * * * if the cor- "poration has no organization, officers or agents anywhere

"how can this corporation be even constructively sum-
"moned?" The vendor companies *can*, if sued in Wyoming, be summoned; they *have* trustees upon whom, pursuant to Wyoming statutes, process can be served; it is not true, therefore, that in their present condition "no "personal judgment could be rendered against the "companies." Again, in the Wellman case, the suit was originally begun in the State courts against a sole stockholder defendant. A petition was filed to remove the case, and thereafter, by leave of the State court the bill was amended, making the corporation (which was organized in Kentucky) party defendant for the evident purpose of preventing the removal of the cause.

Ervin v. *Oregon Railway & Navigation Co.*, 20 Fed. R., 577, next relied upon by appellant, does not avail it. There the objection was made that the Oregon Steam Navigation Company whose property was said to have been distributed among its stockholders in a fraudulent way was an indispensable party, but had not been impleaded in the action. It will be seen, however, that the statutes of Oregon under which the corporation was created, expressly provided that a majority of the stockholders of a corporation could by their vote dissolve it and *under this statute the corporation had in fact been dissolved.* It was on account of this fact that the company had been dissolved within the common law rule that Judge Wallace held that it was not an indispensable party. Again, in the Ervin case, it appeared that a majority of the stockholders had, upon the dissolution of the company, obtained a larger proportion of its assets than the minority stockholders who were the complainants; the allegations were that the majority stockholders had distributed to themselves an excessive proportion of the assets and that they were therefore liable to the minority

stockholders in a bill for an accounting. The case was not that of a creditor seeking to recover assets from the stockholders, for, if it had been the doctrine of *Walser* v. *Seligman*, which holds that such a creditor must first exhaust his legal remedy, even though the corporation is practically dissolved (and which case was decided by the same learned Judge—Wallace), would have been applied. We entirely disagree with counsel when they assert that the conclusion reached by the learned circuit judge was not based upon the provision of the Oregon statute regarding corporate dissolution. To be sure, some words may have fallen from the court, which by themselves would seem to justify such view of his judgment, but it is plain that his mind was controlled by the fact that there was a final and definitive dissolution.

Counsel for appellant next cite the appeal of Stang, 10 Weekly Notes of Cases (Pa.), 409. The case has no application whatever, because there the complainant had brought suit against the company to recover on a judgment, upon which an execution unsatisfied had been returned. " He thereupon filed the present bill against some of the " stockholders who shared in the distribution of the assets " in order to recover his claim." *A demurrer was interposed to the bill on the ground that the corporation had not been made a defendant; the demurrer was sustained;* therefore complainant amended his bill by averring that the corporation had ceased to act and prayed that as its former officers were parties defendant the service which had been had upon them individually should be decreed service upon the corporation. *No new demurrer was interposed to the amended bill.* It will be observed also that though the corporation was not made party defendant by name, the amended bill prayed that the service

which had been had upon the officers individually should be decreed a service upon the corporation. The court says: "The not making it a party is sufficiently excused "by the amendment. *If the appellants were not satisfied "with that excuse, they should have demurred to the bill.*"

Counsel for appellant also cite *Silver Valley Mining Company* v. *Baltimore, etc., Co.*, 99 N. Car., 445. There the debtor corporation transferred to a new corporation certain property in trust; the complainant being one of the *cestuis que trust*. The old and new corporations were identically the same, having the same name, the same stockholders, the same property, the same liabilities and the same purposes of organization. The court says:

"This corporation (the old one) is a non-resident, and not within the jurisdiction of the court; besides, it appears that its stockholders have dissolved and abandoned it, as far as they could do so, without a formal surrender of its charter—that it has assigned all of its property, rights, credits and effects of every kind whatsoever to the defendant corporation and has, so far as it could, merged itself in the defendant corporation, which latter has assumed to represent it and likewise all its liabilities. This fully appears from the deed of assignment which the answer of the defendant corporation admits, and the answer so in effect declares. The defendant trustees admit the facts so to be, and they say in their answer that they have recognized the rights of their co-defendant corporation, and have agreed with it, and intend, unless prevented, to execute the trust in its favor and for its benefit. Furthermore, it appears that the stockholders of the defendant corporation are mainly, it not altogether, the stockholders of the Maryland corporation (the old one), and their stock in the latter corporation was transferred to and became the stock of the defendant corporation. * * * *The defendant corporation represents and must be treated as the Maryland corporation.* It has all the latter's property, has assumed all its liabilities, and has agreed and assumed to stand in its place and stead, and it must be treated as so doing for the purpose of the action."

Furthermore, it appears that in that case the bill was filed by a *cestui que trust*, the liability in whose favor had been in writing assumed by the new corporation to enforce a performance of the trust. Nor does it appear that the objection that a necessary party had not been made defendant was properly taken in apt time. The North Carolina statute provides that the defendant may demur when it appears upon the face of the complaint that there is a defect of parties. When it does not appear on the face of the complaint, the objection may be taken by answer, and if the objection shall not be so taken the statute provides that "the defendant shall be deemed to have "waived the same." The court says: "*The objection* "*was not taken by demurrer or answer, and so the de-* "*fendant waived the right to make it at all.*"

In this connection, another consideration deserves attention. The claims asserted by the appellant in this bill, are such as are peculiarly fit for examination at law, and by a jury. They are claims sounding in damages, which it is asserted have accrued by reason of certain fraudulent acts on the part of the vendor companies in wilfully, knowingly and corruptly misrepresenting the number of their cattle which they were proposing to sell to the plaintiff, and the alleged breach on their part of their covenants in that regard. The bill seeks to draw such a case into a court of equity.

And there is another fact to be noticed in the same connection. The liability for the alleged wrongs is primarily that of the vendor corporations, and only secondarily that of these defendants. The corporations made the sale, and the false representations and the covenants. They made them (it is alleged) by their agent Alexander H. Swan; there is nothing to show that any one of the defendants here was guilty of those acts, or knew of them until in-

formed by this bill. Their liability is based upon the charge that they in common *with other stockholders who are not before the court as parties*, received from their companies the proceeds of the sale. It is certainly a very extraordinary case which will permit this plaintiff to call upon these defendants without first pursuing the wrong-doer to the full extent of the law, and establishing its demands by the verdict of a jury, and the judgment of a court of law.

Complaint is made of us for asserting these objections as if the plaintiff were remediless if this bill cannot be maintained. If, when it was filed, the plaintiff had seen fit to go to Wyoming and prosecute its demands there, in an orderly course of litigation, it would have received such measure of justice as it showed itself entitled to. If it there recovered a judgment upon which execution was returned *nulla bona*, it could have filed a creditor's bill, had a receiver appointed, and that receiver could have sued the stockholders in any forum where found and recovered back the assets alleged to have been wrongfully distributed among the stockholders.

Patterson v. *Lynde*, 112 Ill., 196.

When driven out of the court below by the decree of a very judicious and learned judge, the same course was open to it; and when this court shall remit it to its condition before it began this fruitless litigation, the same remedies may be sought by it. The case is only one of many which fill the books, in which parties have mistaken their remedies, and this brings us to the next defense.

Fourth Point.

Another and fatal objection to this bill is that this appellant alleges itself to be a creditor at large, not having recovered judgment at law and the return of an unsatisfied

excution. There have been a great many cases in this court in which creditors of corporations have sought to recover corporate debts against stockholders. In not a single one of them has a bill been maintained in which a judgment at law against the corporation has not been shown. A review of the cases may not be without interest for the purpose of showing that uniformly judgments at law have been considered a pre-requisite to an appeal to the equitable powers of the court. We are the more confident in saying that no case can be found in which this relief has been awarded, where judgment has not been first recovered, because the diligence of the learned counsel for appellant seems not to have discovered any.

MEMORANDUM OF CASES DETERMINED IN THE FEDERAL COURTS, IN WHICH BILLS WERE FILED TO REACH ASSETS BY THE CORPORATIONS DISTRIBUTED AMONG THEIR STOCKHOLDERS, LEAVING UNPAID DEBTS, AND IN WHICH JUDGMENTS AND UNSATISFIED EXECUTIONS WERE ALLEGED.

1. *Mumma* v. *Potomac Company*, 8 Pet., 281:

This was a writ of *scire facias* against the Potomac Company, to revive judgment recovered against it; ten years before, that company, acting under authority of the statute of Virginia, transferred all of its funds to the Chesapeake and Ohio Canal Company, and, therefore, as provided in the statute, its charter became affected and annulled, so that afterwards it ceased to exist.

Mr. Justice STORY delivered the opinion of the court, and held that the Potomac Company having ceased to exist, no proceedings could be had against it any more than against a dead man, and he held that the statute dissolving the corporation did not impair the obligation of a con-

tract, within the provision in that behalf of the constitution of the United States, and in course of the opinion he used the following language:

"The creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

He then proceeded to show that the statute provided for the application of the assets of the company to the payment of its debts.

The expression in the course of the opinion cited above was not necessary to the decision, but it was undoubtedly correct, for two reasons:

First. Judgment had been recovered against the debtor corporation.

Second. Had judgment not been recovered, no proceedings at law could possibly be had against it. For this reason it would have been competent for equity to proceed against the party in whose hands the corporate assets were found; undoubtedly the rule is here enforced that when it is *impossible* to sue at law and recover a judgment and execution, these proceedings will not be required before equity will apply a debtor's property to the payment of his debts. This would be as true in the case of a defunct corporation as in that of a deceased individual.

2. *Curran* v. *Arkansas*, 15 How., 304:

The bill in this case was originally filed in the State court, and was taken to the Supreme court of the United States by writ of error.

Curran filed his bill against the State of Arkansas, the State Bank of Arkansas and its attorney and receiver. In it he alleged that the capital stock of the bank con-

sisted of money raised upon the bonds of the state and other moneys belonging to the state, and that the bank had issued bills to circulate as money. $9,000 of these bills had come to him and at the foot of page 305 it is stated by Mr. Justice CURTISS in the opinion of the court that the plaintiff had:

"*Instituted suits and recovered judgments thereon at law upon which executions running against the goods, chattels and lands of the bank have been duly returned, wholly unsatisfied.* The general scope of the bill, therefore, is to obtain the aid of a court of equity to reach such assets of the bank as ought to be appropriated to satisfy this judgment debt. The parties in whose hands it is alleged these assets are, are the State of Arkansas and two other defendants, who are alleged to have charge of certain effects of the bank in behalf and under the authority of the state."

At the foot of page 307 it is said that the question, what are the plaintiff's rights uncontrolled by the particular statute, may be answered without much difficulty.

"The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among the stockholders or gone into the hands of others than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of the creditors which a court of equity will enforce and compel the application of the property to the satisfaction of their debts."

The learned judge cites the language of Judge Story in his Equity Jurisprudence. Also *Mumma* v. *Potomac Company*, *Wood* v. *Dummer*, and other cases.

From the form of the bill and the theory of it given by the learned judge, it is nothing more than an ordinary

creditor's bill, and yet it is supported by needless reference to the doctrine of trusts as stated in *Wood* v. *Dummer*.

3. *Ogilvie* v. *Knox Insurance Co.*, 22 How., 380:

This was a bill filed by the plaintiffs and such other creditors as might make themselves parties thereto against the corporation and thirty-seven persons subscribers to its stock. It is stated in the report that

"— *the bill alleged that the complainants had recovered divers judgments against the insurance company upon which executions had issued, the return to which had been 'no property';* that the other defendants severally subscribed for stock in the company, and were still indebted for it, payment not having been enforced by the company; the prayer of the bill was, that they might be decreed to pay their subscriptions and that the judgments might be satisfied from the fund thus produced."

Mr. Justice GRIER, delivering the opinion of the court, said, "that the company was insolvent, or at least unable "to pay its creditors without calling in the capital sub- "scribed and secured, but not actually paid in cash." The case is treated as an ordinary creditor's bill.

4. *Railroad Co.* v. *Howard*, 7 Wall., 392:

Certain municipalities of Iowa issued their bonds to the Mississippi and Missouri Railroad Company in payment for stock in that company. That company guaranteed these bonds. Default having been made in the payment of interest coupons attached to the bonds, the holders brought suits against the municipalities and the company as guarantor, and had judgments and executions which were returned not satisfied. *The bill was filed by the judgment creditors to reach a fund held for the stockholders of the company.* That fund was raised in this way. The company had made several mortgages upon all of its property, and was insolvent. Upon a scheme of organization common in such cases the mortgages

were foreclosed without defense by the company, and sixteen per cent. of the stock was to be paid to the holders thereof. The fund for payment of this proportion of the value of the stock was in the hands of a new railroad company, organized to take the old company's property, and was sought to be reached by this bill.

Mr. Justice Clifford, delivering the opinion of the court citing the same cases as those upon which *Curran* v. *Arkansas* was ruled, held that this fund, having been realized from a sale of the corporate property, were assets for the payment of debts, and he speaks of it as a trust fund for that purpose. The decree of the Circuit court was in favor of the judgment creditors, and it was affirmed.

5. *New Albany* v. *Burke*, 11 Wall., 96.

This was a bill brought on the 29th of January, 1868, by the equitable *owners of a judgment recovered on the 14th of November, 1859, against the New Albany and Sandusky City Junction Railroad Company, and execution had been returned unsatisfied.* The city of New Albany subscribed for stock in the railroad company and issued its bonds in payment thereof. The company having been insolvent and its enterprise having failed, a compromise was effected between the company and the city by which the stock and the bonds were surrendered. The bill was filed to compel the city to pay the judgment on the ground that this compromise was void as to the creditors of the company. The court held the compromise valid, and that the claim was stale. Mr. Justice STRONG, speaking for the court, said in the course of his opinion:

"No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent and might

have been set aside by a court of equity. But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts, and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged."

6. *Burke* v. *Smith*, 16 Wall., 390:

This was a bill evidently brought on the same judgment as in the preceding case by the same parties, against individual subscribers to the stock of the same company. These subscriptions were made upon the express condition that they should be taken by the city of New Albany if it should issue its bonds for stock in a much larger sum. The theory of the bill was that this condition was void and the defendants were bound to pay for the stock. The court held the condition valid, and for that reason and because the plaintiffs were guilty of laches, dismissed the bill.

7. *Sawyer* v. *Hoag*, 17 Wall., 610:

The Lumberman's Insurance Company received Sawyer's subscription to its capital stock under an arrangement by which he paid for the stock and then immediately received almost all the money and certain collaterals as a loan. The company became bankrupt and Hoag was appointed its assignee. After the company had become insolvent by reason of the great fire in Chicago, but before the petition in bankruptcy was filed, Sawyer bought a certificate of adjusted loss, and insisted upon setting the same off against his note. The assignee having advertised the collaterals for sale, Sawyer filed his bill to enjoin the sale and to enforce his set-off.

The question in the case was whether he was entitled to the set-off. In this case, therefore, the bill was exhibited by the debtor of the company, and the question before us could not arise. In the course of its examination, Mr. Justice Miller repeatedly characterizes the cap-

ital of a corporation as a trust fund, and cites the cases mentioned above. But he also cites the two New Albany cases, taking care in stating that in the first the plaintiff was a judgment creditor, who had exhausted his remedy at law. The question here was not before the court and did not receive critical attention.

8. *Barings* v. *Dabney*, 19 Wall., 1:

The bank of the State of South Carolina was incorporated by an act of that state and belonged to it, and its profits were pledged to pay the bonds of the state.

In 1838 other bonds of the state to the amount of $2,000,000 were issued to aid in rebuilding Charleston, which had suffered by a great fire. The act authorizing the issue of these bonds provided that the money realized therefrom should be added to the capital of the bank, and pledged this fund, with its accumulations, to the payment of the bonds. These bonds were guaranteed by the bank, and £109,000 came to the hands of the Barings, in London.

State stock was also issued, payable at the state treasury, of which $318,000 were held by a few persons in South Carolina. At the close of the war the bank was insolvent, and in 1865 an act was passed requiring its president and directors to close it and realize on its assets and apply the proceeds to pay these bonds and redeem its outstanding notes.

Dabney, Morgan & Co., holding bills of the bank, filed their bill in the state court of chancery on behalf of themselves and all other billholders against the Barings and the holders of the state stock, insisting that the defendants were not creditors of the bank, and that the act of 1865 was unconstitutional, and prayed that the bank be restrained from carrying it into effect, and that the plaintiffs and other billholders be paid out of the property and

assets of the bank. The defendants insisted that the act of 1865 was an appropriation in the nature of an assignment for the benefit of creditors of the as ets of the corporation for the payment of its debts. Pending the suit the act, so far as it had such operation, was repealed. Mr. Justice BRADLEY, speaking for the court, expressly said that the state was the sole stockholder, and the bank in its relation to the state was *alter et idem*. "In this respect "its position was very different from that of private cor- "porations. The action of the legislature could only be "questioned by the creditors of the bank; as to the bank "itself, the wishes of the legislature were commands." He says: "As an enactment it (the act) created "*ipso facto* a trust and made the bank a trustee for the "parties provided for by it." And further "the act was "a law of the state making the corporation a trustee."

He then shows that the holders of the bonds and the stock were not creditors of the bank, but were simply creditors of the state and therefore the assets of the corporation could not be applied to the payment of its debts, and affirmed the decree of the state court placing the bondholders on an equal footing with other creditors and excluding the stockholders from participation in the fund.

In this case the plaintiffs were not judgment creditors, but the question of their right to bring the suit was not discussed. Nor in fact was that a question which could be raised because the case came before the Supreme court by writ of error to the state court. Besides, inasmuch as the statute of 1865 declared a trust and made the bank a trustee the remedy in equity was proper.

9. *Broughton* v. *Pensacola*, 93 U. S., 266:

This was a bill brought by the holder of coupons detached from bonds issued by the city of Pensacola. All that was determined in the case was that the defendant

was liable for the debt, notwithstanding it was reorganized under a general statute of the state. In the course of his opinion Mr. Justice Field says:

"That a court of equity will now lay hold of the property of a *dissolved corporation* and administer it for the benefit of its creditors and stockholders. The obligation of contracts made whilst the corporation was in existence survives its dissolution, and the contracts may be enforced by a court of equity so far as to subject for their satisfaction any property possessed by the corporation at the time. In the view of equity its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation upon the surrender or extinction in other ways of its charter is possessed of any property a court of equity will equally take possession of it for the benefit of the creditors of the corporation. In this case it is averred in the bill that the city of Pensacola upon the surrender of its original charter did not possess any property. It is not necessary, however, in the view we take of the proceedings for the reorganization of the city government to consider the effect of an absolute repeal of the charter of a municipal corporation upon its obligations. It is sufficient that here in our judgment there was a continuation of the corporation of Pensacola, with its original rights of property and obligations, not a new and distinct creation of corporate capacity and liability."

What is said by the learned judge in the first part of this decision was unnecessary in view of the last sentence, but it may be further stated that the question before us does not seem to have been raised, besides it may be added that our contention does not require us to show that a judgment and execution are necessary, when the corporation has been dissolved and its property has been transferred. We admit that if proceedings at law cannot be prosecuted as is the case when a corporation is dissolved, that is to say, when it is dead, equity will reach its corporate assets.

10. *Terry* v. *Anderson*, 95 U. S., 628:

This was a bill filed by the plaintiffs on behalf of themselves and others against the assignees of a bank which had become insolvent and had made an assignment for the benefit of creditors and also against its stockholders, who had not paid their subscriptions in full. The case was first determined upon the ground of the statute of limitations. Upon a petition for rehearing Mr. Justice WAITE stated that:

"Ordinarily a creditor must put his demand into judgment against a debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a *dissolved* corporation may not, under certain circumstances, claim to be exempted from its operation; if he can recover, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee; but here there was a trustee invested with ample powers to collect and dispose of all the assets belonging to the alleged trust fund. In a suit to which these appellants were parties, one court of equity has found that this trustee has fully executed his trust, and that the fund is exhausted. That decree is a bar to any further proceeding in equity by them as creditors of the bank before judgment for the purpose of securing the administration of the same trust. *If there are assets which the trustee did not reach, the appellants are to be remitted to their remedies after judgment against the bank to subject equitable assets to the payment of their demands. We have seen in the former opinion filed that they do not now occupy the position of judgment creditors.*"

This decision is worthy of special attention, for it embraces the ground upon which a bill in equity may under certain circumstances be maintained to reach the assets of a corporation, that is to say, when the corporation is dissolved, or, in other language, is dead, and there is

no person representing the fund. For the purpose of remedy and for this purpose only, the fund is considered a trust fund, and is reached by equity because there is no trustee; but the chief justice further expressly says, that if there are assets which have not been reached by the trustee, judgments must be first had against the bank and the legal remedy exhausted. Our comment upon this case is fully sustained by its review in *Atlantic, etc., R. Co.* v. *Western R. Co.*, 1 U. S. Ct. of App., 676 (decided June 6, 1892).

11. *Hatch* v. *Dana*, 101 U. S., 205:

This was a bill filed by Dana to *recover upon a judgment against a corporation upon which execution was issued and returned nulla bona.* The defendants were subscribers to the capital stock upon which they had paid twenty per cent., the remaining eighty per cent. being still unpaid, and the bill was to reach these assets.

12. *County of Morgan* v. *Allen*, 103 U. S., 498:

The county of Morgan issued bonds in payment of its subscriptions to the capital stock of the Illinois River Railroad Company.

Litigation sprang up between the company and its creditors touching the application of these bonds to its debts, and at last by agreement between the company, certain of its creditors and the county, a decree was entered that the bonds, amounting to $50,000 and interest thereon, be surrendered to the county upon its payment of certain of the company's debts amounting to $17,832.18, which was done. The company having mortgaged its road to secure its bonds for a large amount, and having made default, a foreclosure and sale followed with a decree for deficiency against the company. *The present suit was brought by holders of all the bonds, and therefore equitable owners of the decree, to*

compel the county to pay upon the decree so much of the amount of its bonds not covered by the company's debts. It is said in the statement that:

"The bill proceeds upon the ground that the bonds issued for the subscription were a part of the assets of that corporation, constituting a trust fund to which its creditors could resort for the satisfaction of their debts. Before the commencement of this suit the county had obtained possession of and destroyed or canceled its bonds. It denied all liability to the complainants as creditors of the company, by reason of the alleged subscription or upon any other ground. The complainants contended that the county obtained possession of the bonds in fraud of their rights as creditors of the company, and that, to that extent it had not, in fact, paid the amount due upon the bonds given for the subscription, but remained, notwithstanding their cancellation, liable to the creditors of the company. In that view the court concurred, and having ascertained through a master that there was due from the county, principal and interest, on its original subscription of $50,000 in bonds, the sum of $72,539.56, after allowing all payments theretofore made by it to creditors of the company, a decree was rendered in favor of the complainants for that amount. From that decree the present appeal is prosecuted by the county."

In that case the plaintiffs were judgment creditors, that is to say, they were equitable owners of an unsatisfied decree against an insolvent corporation all of whose property had been sold under the original foreclosure decree. The case is, therefore, within the rule for which we contend.

13. *Taylor* v. *Bowker*, 111 U. S., 110:

This was a bill filed by a *judgment creditor against the trustees of an insolvent insurance company* and Hill, its treasurer, and stock holder, to recover from him what he had received upon the division of the corporate assets made before payment of its debts. Hill pleaded the statute of limitations. The bill was filed under a state statute providing that when a corporation whose charter

has expired or terminated has unlawfully made a division of any of its property, *a judgment creditor may file a bill to reach such property.* The Supreme court held that the right of action did not accrue until execution had issued and been returned unsatisfied.

14. *Richmond* v. *Irons*, 121 U. S., 27:

The original bill filed by James Irons against the Manufacturers' National Bank of Chicago, organized under the National Banking act, and Holmes, its president, alleged that the *plaintiff had recovered a judgment against the bank, that execution had been issued and returned unsatisfied;* that the bank had suspended payment and business, and pursuant to section 44 of the banking law had gone into voluntary liquidation. Holmes, its president, having its affairs in his hands; the bill then proceeded to set forth the dealings of Holmes with the assets of the bank, before it had gone into liquidation, and prayed discovery of what had come to his hands of the assets of the corporation and his dealings therewith, and that all conveyances made by him be deemed fraudulent and that all such property be subjected to the payment of the judgment.

On the 5th of October, 1876, an amended bill was filed impleading other defendants, in which, after alleging the judgment and execution and suspension of the bank, there is set forth the names of various stockholders to whom it was alleged Holmes had transferred its assets in lieu of their certificates of stock for the purpose of discharging them from personal liability under the statute. The prayer was to enforce the statutory liability against the stockholders, avoid the dealings between Holmes and them with the corporate assets and briefly for an administration of the corporate affairs.

Upon the hearing of the pleadings and proofs and the

master's report, leave was given to amend the amended bill by stating that it was exhibited on behalf of all the creditors of the corporation. Decree was rendered against certain of the defendants who were stockholders of the bank, enforcing their statutory liability. An elaborate opinion was delivered by Mr. Justice Matthews, who stated that the original billwas not strictly and technically a creditor's bill merely, but also a bill for the administration of the corporate affairs, because it prayed not only for the payment of the judgment set forth in the bill, but also because the National banking act expressly provided that suits of such character should be for the benefit of all the creditors.

It will be observed that the bill was originally exhibited on behalf of the judgment creditors, and when turned into a bill on behalf of all the creditors, it was by virtue of a statute, so that in whichever view the case may be regarded, it is not in opposition to our contention.

Several other cases to the same effect will be found in the reports of the decisions of the Circuit courts. In *Walser* v. *Seligman*, cited above, and relied upon with great confidence by the appellant in support of the contention that the vendor companies are not necessary parties, the question now under consideration is dealt with by Judge Wallace, and our view is fully sustained.

Appellant's contention, based upon the opinions in *Case* v. *Beauregard*, 99 U. S., 119; 101 U. S., 688, is clearly unsound. It is insisted that in that case it was held that a creditor of an insolvent partnership may, without having reduced his claim to judgment, maintain a bill in equity to recover partnership property disposed of by the partners. The claim, to be of any force here, must have that reach. Mr. Justice Strong, who delivered both opinions, would be greatly surprised

to hear that he had been understood to have held language which would bear such construction, and his surprise will be shared by any one who reads his first opinion. The ultimate facts of the case were these: There was a partnership of three members; two of them, who were the real owners of the partnership assets, by separate acts assigned their interests for a good consideration to *bona fide* holders. The first bill sought to reach these assets upon the principle that the partnership creditors have a lien upon and a trust in their favor in partnership property, and by virtue thereof may reach the same as against individual creditors and parties under them. Mr. Justice Strong found that the plaintiff had no lien upon the property and that there was no trust in his favor in respect of it. The learned judge says:

"It is indispensable, however, to such relief, when the creditors are, as in the present case, *simple contract creditors*, that the partnership property should be *within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode.* This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed *in custodiam legis. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.*" And he concludes his opinion with this paragraph:

"What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

"The bank has, therefore, no specific claim upon the property, nor is there any trust which a court of equtiy

can enforce; and it was well said by the circuit justice that without some constituted trust or lien, 'a creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding in equity." "Decree affirmed."

No language could be more clear to the effect that partnership creditors who have no lien upon or trust in respect of the partnership assets must show judgments at law before coming into equity to reach such assets in the hands of third parties. The second opinion delivered by the same learned judge at the next term of the court is supposed to hold the exact opposite doctrine. That is rather startling.

The bill upon which the case was first before the court did not allege that the plaintiff had recovered a judgment at law. He thought that if he could show that fact he could recover. Accordingly after this court had dismissed his bill he obtained judgment and filed a new bill just like the other except that he stated the additional new fact of his judgment.

To this bill the defendants pleaded the former decree in bar. The only question was whether a new case was made by the one additional fact. All of the conveyances, assignments and transfers and all that made them illegal and fraudulent were set up in the two bills in the same form and to the same effect. If what had been decided on the first of them were applied to the second the case was not helped by the recovery of the judgment. It was upon this ground that the plea of former recovery was based. It has been supposed that some of the language of the second opinion favors the doctrine exactly opposite to that declared in the first opinion. Possibly some expressions in the opinion taken by themselves may give countenance to that notion. But if those expres-

sions are so read, they not only contradict what had been said by the same learned judge a very short time before, but they lead to extraordinary consequences. For instance, on page 690, it is said that generally a creditor's bill must show a judgment at law and *execution returned unsatisfied.* And then we have language supposed by appellant to relieve the creditor of the necessity of recovering judgment when the debtor has fraudulently conveyed his property and has none remaining in his hands out of which the debt may be made, on the ground that a useless and fruitless proceeding will not be required. Why then should it have been stated to be necessary in a creditor's bill proceeding to show a judgment and execution returned *nulla bona* if the debtor has no property subject to execution. To state the two propositions in juxtaposition is to show that the learned judge never intended to countenance appellant's contention in the face of a long line of prior adjudications in this court.

We do not need to point out the object of the expressions which seem to have given encouragement to the appellant here. It is enough to say that as the court had formerly held that the plaintiff had no lien or trust in his favor, and had so held upon a very careful examination and consideration of the facts upon which such lien and trust were asserted, and the same facts were shown in the second case it was held that the judgment alleged therein could not give a new equity.

Read in the light of all the circumstances and of the first opinion, all that Judge Strong can be taken to mean in the second opinion is that a new case was not made by the allegations of judgment at law and unsatisfied execution.

Case v. *Beauregard* was first referred to in this court

in *Fitzpatrick* v. *Flanagan*, 106 U. S., 648, 655, where Mr. Justice MATTHEWS approvingly quotes the following expression from 99 U. S., 119: "It is indispensable, how-"ever, to such relief, when the creditors are as in the "present case, simple contract creditors, that the partner-"ship property should be within the control of the court "and in the course of administration, brought there by "the bankruptcy of the firm, or by an assignment, or by "the creation of a trust in some mode. This is because "neither the partners nor the joint creditors have any "specific lien, nor is there any trust that can be en-"forced until the property has passed *in custodiam legis*."

That this court did not construe its decision when the case came before it a second time in 101 U. S., to mean what appellant's counsel contend, is evidenced by what Mr. Justice Matthews further says: "Another case be-"tween the same parties came again for consideration "before the court which reaffirmed the decision and held "that in *such a case* the bill might properly be filed by a "creditor without first reducing his claim to judgment." By expression "such a case" reference was surely had to the case already referred to, viz: one wherein "the "property had passed *in custodiam legis*."

In *Huiskamp* v. *Moline Wagon Co.*, 121 U. S., 310, 323, Mr. Justice BLATCHFORD approvingly quotes from *Fitzpatrick* v. *Flanagan*, that part of the opinion which is quoted from *Case* v. *Beauregard*, 99 U. S.

That the construction we give to *Case* v. *Beauregard* is correct is further attested by similar interpretation given to it on the circuit. See the opinions of Judge TREAT in *Dahlman* v. *Jacobs*, 15 Fed. Rep., 863, 864; Judge HILL, in *Goodbar* v. *Cary*, 16 Fed. Rep., 316, 319.

The Hibernia Insurance Co. v. *The St. Louis & New Orleans Transportation Co.*, 10 Fed. Rep., 596, is supposed by appellant to furnish an example of the application of the doctrine sought to be deduced from Judge Strong's second opinion. The case was this: The Baggage Transportation Company had upon different contracts of affreightment become liable to the shippers for loss and damage. Afterwards that company transferred all its property to the St. Louis and New Orleans Company, as was charged in the bill, without consideration. The new company was substantially the same as the old except in name. On that ground Judge Treat held on demurrer that the bill against both companies should be maintained. The case is obviously very different from the one at bar.

When the case came again before the court in 13 Fed. R., 516 upon the plea of the St. Louis and New Orleans Company attempting to make out of the transaction a *bona fide* transfer of the property of the Baggage Company, Judge McCrary took the view we have expressed of the case as will be seen by what he says on page 518:

"The fair inference from the transaction is that the old company was about to be dissolved and cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company composed, substantially, of the same persons to transact business at the same place and with the same property."

Other language is also used which is more general than that above quoted, but the learned judge comes back to the same principle, as where, on the next page, he says:

"Here was a corporation engaged in a profitable business, and owning and possessing property valued at $92,000, exclusive of its franchise. It owed debts confessedly

amounting to more or less than the value of its property; it ceases to transact business. Its stockholders organized themselves into another corporation, and all the property is transferred from the old to the new."

And in the concurring opinion Judge Treat takes the same view of the case. He says on page 520:

"The evidence sufficiently discloses that the new corporation was a mere continuance of the old, with substantially the same parties in interest—a mere change of name. Whether that change, with attendant transfers, was designed or not to defeat all outstanding demands of the old corporation, it is evident that the new must respond to the obligations of the old. The evidence is clear enough that there was a hidden purpose in the change of corporate existences to escape possible liabilities which equity does not tolerate. A mere change of name cannot avoid obligations. *The new corporation took all the property of the old, went forward with its business, had the same stockholders, except a few formal ones, was, in short, the old corporation, and now seeks to escape the obligations of the old, rescuing the property of the latter from the demands the former was bound to meet.*"

That this court does not regard *Case* v *Beauregard* as establishing the doctrine contended for by appellant is further illustrated by its latest expression upon the subject. In *National Tube Works* v. *Ballou*, decided at the current term, December 19, 1892, a suit in equity was begun against appellee for an accounting of an unpaid subscription by him to the stock of the Wiley Construction Company, and to have the same applied to a judgment recovered by the plaintiff against that company. The bill was filed in the Circuit court for the Southern District of New York, and alleged that the Wiley Construction Company was a Connecticut corporation; that in that state plaintiff had recovered a judgment against it; that execution had issued upon that judgment and been returned unsatisfied, and "that the Wiley company

"had no funds or assets wherewith to pay the claim of "the plaintiff." The question was whether such facts would sustain a bill against the Connecticut corporation in the United States Circuit court in New York. The opinion by Mr. Justice BLATCHFORD closes as follows:

"Where it is sought by equitable process to reach equitable interests of a debtor the bill unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction."

The last clause of this sentence cannot open the door to the appellant here because it refers not to an insurmountable difficulty in obtaining the jurisdiction of a party not within the state, but to the impossibility of obtaining judgment on account of the dissolution of the corporation or some other obstacle of that nature. This will clearly appear from an examination of the cases referred to by the court.

We see no reason why counsel should quote from *Hodges* v. *Silver Mining Company*, 9 Ore., 200, in support of the contention that no judgment is necessary to sustain the present bill. That was a suit by a creditor of a corporation against it and certain of its stockholders to recover a judgment against the company for the debt and a judgment against the stockholders by reason of their unpaid subscriptions on the stock of the company. It will be noticed that *the corporation is the principal defendant* in the case. Furthermore, the decision is based upon the Oregon constitution, which provides that the stockholders of all corporations and joint stock companies shall be liable for the indebtedness of their corporation to the amount of their stock subscribed and unpaid, and no more, and it has been held by the

Oregon courts that the remedy to enforce this liability is in equity where the rights of the corporation, the stockholders and all the creditors can be adjusted in one suit. (See *Ladd* v. *Cartwright*, 7 Ore., 329; *Brundage* v. *Monumental Coal, etc., Co.*, 12 Ore., 332.)

Notwithstanding the case in 9 Ore., it has been held in that state in *Dawson* v. *Coffey*, 12 Ore., 513, that a simple contract creditor cannot sue in equity until he has exhausted his remedy at law. The latter decision comments upon the case in 9 Ore., and says that it "was not "a suit to reach equitable assets of the debtor. *There* "*the stockholders were primarily liable in equity* to the "creditor," and that by virtue of the constitution, irrespective of, whether the corporation was dissolved or not. In the case at bar not even appellant contends that there is any primary liability from the defendants. It is only by reason of the assumed dissolution of the vendor companies that appellant undertakes in equity to pursue directly the secondary liability of the stockholders. A more instructive case than that in 9 Ore., and strongly supporting our contention, is that of *Sturges* v. *Vanderbilt*, 73 N.Y., 384, heretofore referred to (*ante* p., *11*), on another point.

There all the property of a corporation had been divided among its stockholders. The corporation was actually dissolved, and subsequent to its dissolution a creditor obtained a judgment against it, upon which execution was returned unsatisfied. Thereupon the judgment creditor filed a bill to recover the amount of the judgment from the stockholders of the company, among whom it was alleged its assets had been distributed at the time that the claim of the judgment creditor, which was merged in the judgment, existed. The defense interposed was that the judgment, having been recovered

against a dissolved corporation, was void, and that therefore complainant occupied the same attitude as though he had no judgment at all, and that without a valid judgment and execution returned, no liability whatever could be enforced against the stockholders. The corporation thus dissolved had been organized under the New Jersey statute. Says the court (RAPALLO, J.):

"It is claimed on the part of the plaintiff that under the New Jersey statute the corporation after dissolution was not entirely defunct, but was continued in being for the purposes of liquidation and the defense of existing suits, and that it differs in this respect from the statute of this state relating to the liquidation of dissolved corporations. The argument in support of this claim is that by our statute upon the dissolution of a corporation, the directors or managers of its affairs at that time are constituted trustees of the creditors and stockholders of the corporation dissolved, whereas, by the statute of New Jersey, such directors and managers are in the like case constituted trustees of such corporation, and that this language implies that the corporation still exists as *cestui que trust* and is capable of defending in its corporate name. * * * The laws of New Jersey provide a method of continuing actions pending against corporations at the time of their dissolution, which would be quite superfluous if the plaintiff is right in stating that the faculty of defending after dissolution in the corporate name was preserved by the statute thus cited. * * * It is further claimed that until a corporation is declared dissolved by judicial decree, creditors may proceed against it by its corporate name, and that it remains *in esse* until formally adjudged dissolved. All the cases cited in support of this proposition relate to a dissolution in consequence of insolvency or non-user or misuser of the corporate franchises or some other cause of forfeiture. In such cases it is well settled that the dissolution does not take effect until judicially declared, but the principle upon which that class of cases rests is not applicable to a dissolution by expiration of the charter. * * * It is apparent, from what has been said, that this action cannot be maintained as a cred-

itor's suit, founded on the alleged judgment to reach the funds of the corporation which were paid out to stockholders before dissolution. *It cannot be, and is not claimed that such an action could be maintained without a valid judgment and execution against the corporation or its successors, or without first exhausting the creditor's remedies against the property remaining in the hands of the corporation or received by its trustees on its dissolution.* It clearly appears, by the allegations, that more than sufficient to pay the plaintiff's claim was possessed by the corporation at the time of its dissolution."

In the present case the bill shows that over $2,500,000 came into the possession of the trustees of the vendor companies, and, by the Wyoming statutes, a remedy is provided against the trustees for distributing the funds among the stockholders, if, at that time, there existed unpaid debts of the corporation. The court continues:

"The effort is made, however, to sustain the recovery at special term, on the ground that the defendants are liable, under the statute of New Jersey, as trustees of the dissolved corporation. It is difficult to see how this action can be maintained on that ground. The complaint contains no allegation appropriate to such an action, nor does it state the facts necessary to constitute such a cause of action. * * * *The plaintiff had an ample remedy by continuing his action against those directors who continued such at the time of the dissolution, as trustees, to follow the property of the corporation into their hands, and after having exhausted that, to resort to any stockholders, who, at any time, have received any proportion of the company's funds in excess of lawful dividends.*"

The doctrine there laid down is confirmed in *Hastings* v. *Drew*, 76 N. Y., 9, and is followed in the text of Cook on Law of Stock and Stockholders, 2d Ed., Sec. 548, where the author says that in proceedings to recover back assets distributed among stockholders:

"It is a necessary condition precedent to the right to bring this action that a valid judgment shall have been

obtained against the corporation, and that execution thereon shall have been returned wholly or partly unsatisfied, and this judgment is conclusive as to the merits of the creditors' claim."

We have already shown that the case of the *State Savings Association of St. Louis* v. *Kellogg*, 52 Mo., 583, cited by appellant to the point that no judgment is necessary, rests upon a statute which provides that a corporation is dissolved when it is without funds to meet its debts. In the extract from the opinion on page 56 of appellant's brief appears the following quotation from the opinion of the court: "But here, before the limitation had expired, "*the corporation was dissolved.*" Of course, in such a case, judgment at law is unnecessary.

It is not easy to see what aid the case of *Sprague Brimmer Manufacturing Co.* v. *Murphy Furnishing Goods Co.*, 26 Fed. R., 572, can afford appellant. It was a bill filed to secure a statutory remedy. The statute provides that upon the *dissolution* of a corporation the president and directors shall be trustees of its assets and administer them to pay the debts and divide what is left among the stockholders, and renders them personally liable for whatever should come to their hands.

The company was treated by the court as *dissolved;* from this it results as we have shown above that the company is not a necessary party, and that a judgment against it need not be shown. The reason is that a dissolved corporation is dead, and cannot be sued any more than a dead man, and it being impossible to recover judgment against it that proceeding will not be required. We have shown that the vendor companies are not in that condition. Still further: the statute on which the right of action was based in the case cited makes the president and directors trustees and personally responsible for what

comes to their hands. The court went no further than to enforce this statutory liability.

We have reviewed with respect and attention all of the cases and the considerations which have been presented in support of the contention of the appellant. They are easily distinguished from the case at bar and leave in all its force the rule that before the assets of a debtor transferred to another can be reached in equity the creditor must show a judgment at law and an execution returned unsatisfied—and that this rule is applicable to all cases where the creditor has not a specific lien or where there is not a trust in his favor. The rule has passed out of the region of discussion and need not be vindicated by good reasons in its behalf. It may be arbitrary and absolute, but it is a rule of law which must be obeyed. In *Atlantic, etc., R. Co.* v. *Western R. Co.*, 1 U. S. Ct. of App., 676 (same case; 50 Fed. Rep., 790), we find one of the latest Federal utterances upon the question now under consideration. In that case a simple contract creditor endeavored to maintain a bill to subject the property of an insolvent corporation to the payment of a debt in advance of the recovery of a judgment. A number of cases from this court, cited by the plaintiff in support of the jurisdiction of the court were reviewed, particularly *Terry* v. *Anderson, supra; Graham* v. *R. R. Co.*, 102 U. S., 148; *Mellen* v. *Iron Works*, 131 U. S., 353. The court, however, shows that none of those cases support the contention and in quoting from *Scott* v. *Neely*, 140 U. S. 106, concludes thus: "It follows from the facts expressed that the court below "could not take jurisdiction of this suit, in which a claim "properly cognizable only at law is united in the same "pleading with equitable relief." A rule which this

court has held could not in a Federal forum be even changed by a state statute.

Thus *Scott* v. *Neeley*, 140 U. S., 107, is in point. That was a suit in equity by a general creditor to collect a claim out of property alleged to have been conveyed away fraudulently by the defendant debtor to his wife. The suit was brought in equity under a statute of Mississippi providing that the chancery courts of the state "shall have jurisdic-"tion of bills exhibited by creditors who have not obtained "judgments at law," etc., and it was contended that by this statute a new equitable right had been created which was subject to enforcement in the Federal court. Mr. Justice FIELD said:

"The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the states, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or in conflict with any inhibition imposed, by the Constitution or laws of the United States. * * * The Constitution, in its seventh amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right can not be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact. * * *

"This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the judiciary act of 1789, enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law'; and this prohibition is carried into the Revised Statutes. Section 723. It is

declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity. (Citing cases.) All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States."

Fifth Point.

This objection can be best stated without additional comment in the words of the third point of the demurrer:

"Third. That it appears in and by the said bill that the sale therein mentioned was made by said three companies jointly, but does not say that these defendants were stockholders in all of them or in any particular one of them, nor that, as the stockholders of any one of them, they or any of them received any part of the said purchase price, or that if the company of which any individual one of these defendants was a stockholder received any part of the said purchase price of the property in said bill mentioned, yet the debts of the said company were not sufficient to exhaust all of its respective share of the purchase price of said property; whereby it is made to appear that some of these defendants are in

no way interested in the several and distinct matters and causes of complaints in the said bill alleged, and by joining several distinct matters together which do not depend upon each other the proceedings in the progress of the said suit will be intricate and prolix and these defendants and each of them put to unnecessary charges and expenses in matters which in no way relate to or concern them."

We pray for an affirmance of the decree of the Circuit court.

Respectfully submitted.

J. M. WOOLWORTH,
L. MAYER,
Solicitors for Appellees.

CHICAGO, March 4, 1893.